TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 610.

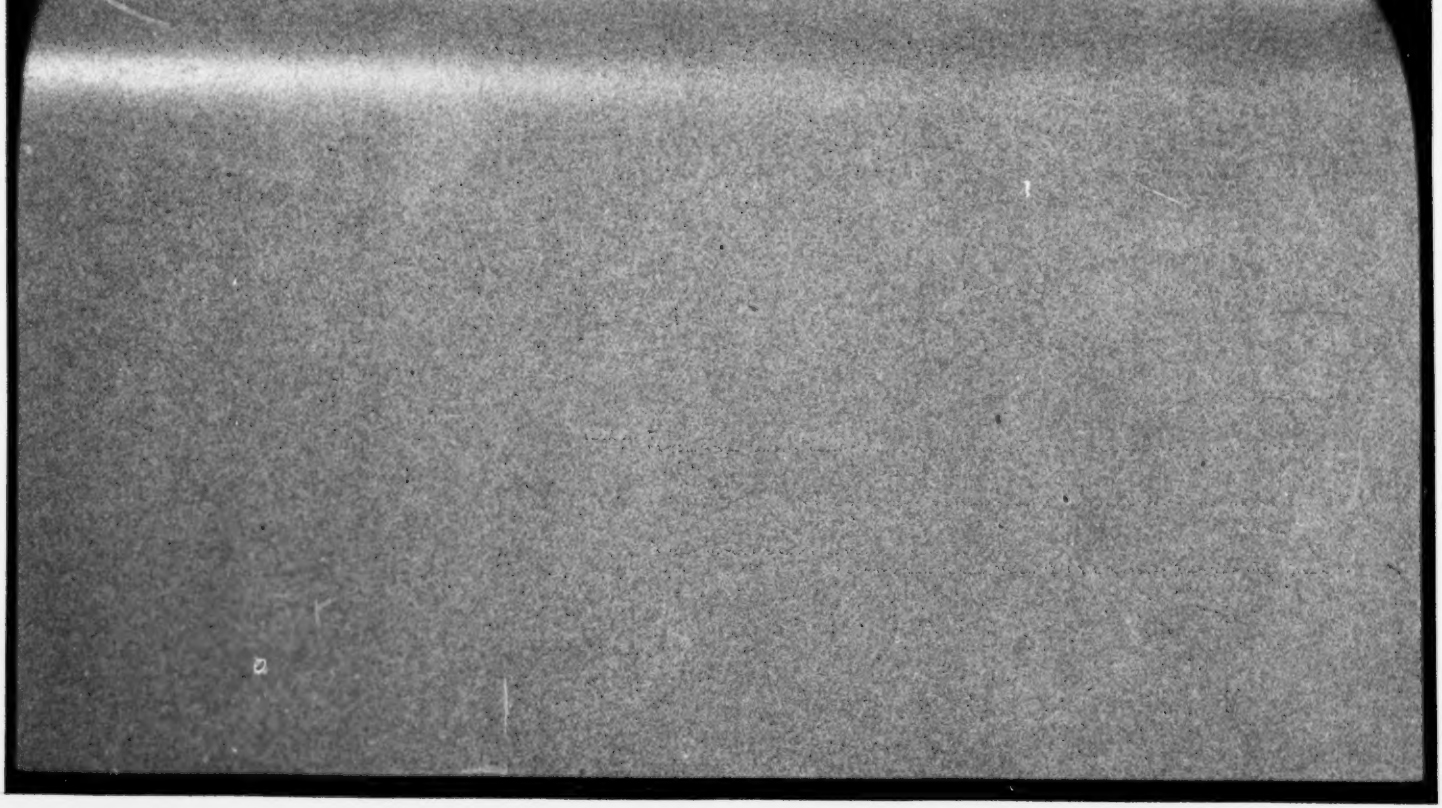
R. W. McCLAUGHRY, AS WARDEN OF THE UNITED STATES PENITENTIARY AT FORT LEAVENWORTH, KANSAS, APPELLANT,

vs.

PETER C. DEMING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MARCH 26, 1902.
(19,262.)



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1 In the circuit court of the United States for the district of Kansas, first division.

PETER C. DEMING, ON THE PETITION OF John H. Atwood, petitioner,
vs.
ROBERT W. MCCLAUGHRY, RESPONDENT.
} Petition in habeas corpus.

To the circuit court of the United States for the district of Kansas:

Your petitioner respectfully shows to your honorable court that prior to June 12, 1901, Peter C. Deming was a captain in the Subsistence Department of the Volunteer Army of the United States, and that he is now imprisoned and restrained of his liberty by one Robert W. McClaughry, the warden of the United States prison at Fort Leavenworth, Kansas, and that the place of said confinement is at said Fort Leavenworth, Kansas. Your petitioner shows that he, Deming, is imprisoned and restrained by virtue of a sentence imposed upon him by a general court-martial of the United States, convened by William R. Shafter, Maj. General U. S. Vols., and Brig. Gen. U. S. A., retired, being of the age of 64 years, at the Presidio of San Francisco, Calif., which said sentence is as follows:

"And the court does therefore sentence him, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, 'to be dismissed the service of the United States, to be confined in such penitentiary as the reviewing authority may direct for the period of three (3) years, and that the crime, punishment, name, and place of abode of the accused shall be published in the newspapers in and about the city of San Francisco, California, and in the State where the accused usually resides.'"

(G. O. No. 80, H. Q. A. A. G. O., 6–8–00.)

That said sentence was approved by the Secretary of War and confirmed by the President of the United States on the 8th day of June, 1900.

That the warrant or mittimus under which the said McClaughry detains said petitioner, Deming, as aforesaid, is the following order from the headquarters of the Army, that is to say:

"By the direction of the Secretary of War, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, ceases to be an officer of the Army from June 12, 1900, and the United States penitentiary at Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the commanding general, Department of California, under proper guard.

"By command of Lieutenant-General Miles.

"H. C. CORBIN,
"*Adjutant-General.*"

2 That the court-martial which imposed the said sentence was convened by virtue of the following order:

"Special Orders, No. 65. } "HEADQUARTERS DEPARTMENT OF CALIFORNIA,
"*San Francisco, Cal., March 29, 1900.*

"7. A general court-martial is appointed to meet at the Presidio of San Francisco, California, at 11 o'clock a. m., on Tuesday, the 3rd

proximo, or as soon thereafter as practicable, for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers.

"Detail for the court:

"Colonel Jacob B. Rawles, 3rd Artillery.
"Lieutenant-Colonel Richard I. Eskridge, 23rd Infantry.
"Major Louis H. Rucker, 6th Cavalry.
"Major Benjamin C. Lockwood, 21st Infantry.
"Captain Frank West, 6th Cavalry.
"Captain Carber Howland, 4th Infantry.
"Captain Sedgwick Pratt, 3rd Artillery.
"Captain Henry C. Danes, 3rd Artillery.
"Captain Charles A. Bennett, 3rd Artillery.
"Major Stephen W. Groesbeck, judge advocate, U. S. Army, judge advocate.

[SEAL.]

"The court is empowered to proceed with the business before it with any number of members present not less than the minimum prescribed by law, the above being the greatest number that can be convened without manifest injury to the service.

"Such journeys as Colonel Rawles, Major Groesbeck, and Captain Pratt may be required to make between their respective stations and the Presidio of San Francisco, in attending the meetings of the court, are necessary for the public service.

"By command of Major-General Shafter:

"J. B. BABCOCK,
"*Assistant Adjutant-General.*"

Your petitioner avers that said Deming was an officer of the Volunteer Army and forces of the United States, and that said court-martial so above set forth and which tried said Deming were all officers in the Regular Army of the United States, and he could not legally or lawfully be tried by a court-martial composed of officers of the Regular Army of the United States, for it would be in direct violation of the 77th Article of War (sec. 1342, Rev. Stat. of the U. S.), which is as follows:

"Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Art. 78."

Article 78 is as follows:

"Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of an offender belong to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present, and duly authorized, shall be obeyed."

3 Your petitioner further avers that article 78 has no application to the Volunteer Army or forces of the United States, and only relates to the association of officers of the Regular Army and marines serving on courts-martial.

Your petitioner further says that he was tried and convicted without due process of law and in violation of the 5th amendment to the Constitution of the United States.

Your petitioner further avers that under the law said court-martial is an illegal one, and without warrant of law, and that the sentence imposed by them upon said Deming is without warrant or authority at law, illegal and void, and that the detention of said Deming by said McClaughry under said pretended sentence and order is without warrant of law, illegal and void.

Wherefore, your petitioner prays that a writ of habeas corpus issue out of this court, directed to said Robert W. McClaughry, warden as aforesaid, commanding him to have the body of said Deming before this honorable court, as shall be directed in said writ, to do and receive what shall be considered by the court meet and proper, and that he may be restored to his liberty.

JNO. H. ATWOOD,
Petitioner.

UNITED STATES OF AMERICA,
District of Kansas, ss.

I, John H. Atwood, being duly sworn, upon oath depose and say that I am the petitioner in the foregoing application subscribed by me; that I have read the same and know the contents thereof; and that the same are of my own knowledge, except as to those statements alleged to be on information and belief, and as to those matters I believe them to be true.

J. H. ATWOOD.

Subscribed and sworn to before me this 28th day of August, 1901.

[SEAL.] DAVID W. FLYNN, *Notary Public.*

My commission expires August 31st, 1904.

4 (Endorsed:) No. 7951. Peter C. Deming, etc., plaintiff, vs. R. W. McClaughry, defendant. Petition for habeas corpus. Filed Sep. 11th, 1901. Geo. F. Sharitt, clerk.

5 In the circuit court of the United States for the district of Kansas, first division.

In the matter of Peter C. Deming on the petition of John H. Atwood for a writ of habeas corpus.

The President of the United States of America, to Robert W. McClaughry, Warden of the United States Penitentiary at Fort Leavenworth, Kansas.

We command you that the body of Peter C. Deming, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before the Honorable William C. Hook, one of the judges of the circuit court of the United States for the district of Kansas, first division, at his office in the city of Leavenworth, Kansas, on Wednesday, February 26, 1902, at 2 o'clock p. m. of that day, to do and receive all and singular those things which the said William C. Hook, judge as aforesaid, shall then and there consider of him in this behalf, and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of February, A. D. 1902.

[SEAL.] GEO. F. SHARITT, *Clerk.*

(Endorsed:) No. 7951, Writ habeas corpus. I hereby accept service of within writ at the United States penitentiary, Fort Leavenworth, Kansas, at 9.30 a. m. this 24th day of February, A. D. 1902. R. W. McClaughry, warden. Filed Feb'y 25, 1902. Geo. F. Sharitt, clerk.

6 In the United States circuit court for the district of Kansas, first division.

PETER C. DEMING, ON THE PETITION OF JOHN H. ATWOOD, petitioner,
vs.
ROBERT W. MCCLAUGHRY, WARDEN OF THE United States penitentiary at Fort Leavenworth, Kansas, respondent.

Return of Robert W. McClaughry to writ of habeas corpus.

To the honorable UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF KANSAS.

Respondent, Robert W. McClaughry, warden of the United States penitentiary at Fort Leavenworth, Kansas, in compliance with the writ of habeas corpus heretofore served upon him in the above-entitled cause for the production of Peter C. Deming, respectfully makes return thereto and states as follows:

That at all times herein mentioned, William R. Shafter was a major-general of volunteers, exercising command of the Department of California, by virtue of an assignment of the President of the United States as commander in chief of the Army.

That heretofore, to wit, on the 29th day of March, A. D. 1900, pursuant to the authority and in conformity with the provisions of article 72 of the Articles of War of the United States, said Major-General William R. Shafter, commanding the Department of California, appointed a general court-martial by special orders numbered 65 to meet at the Presidio of San Francisco at 11 o'clock a. m. on Tuesday, the 3rd day of April, 1900, or as soon thereafter as practicable, for the trial of Peter C. Deming, assistant commissary of subsistence, United States Volunteers, the detail of which said court-martial was as follows:

"Colonel Jacob B. Rawles, 3rd Artillery.
"Lieutenant-Colonel Richard I. Eskridge, 23rd Infantry.
"Major Louis H. Rucker, 6th Cavalry.
"Major Benjamin C. Lockwood, 21st Infantry.
"Captain Frank West, 6th Cavalry.
7 "Captain Carver Howland, 4th Infantry.
"Captain Sedgwick Pratt, 3rd Artillery.
"Captain Henry C. Danes, 3rd Artillery.
"Captain Charles A. Bennett, 3rd Artillery.
"Major Stephen W. Groesbeck, judge-advocate, U. S. Army, judge-advocate."

That all the members of said court-martial, so detailed as aforesaid, were members of the Regular Army.

That said court-martial was empowered to proceed with the business before it with any member or members present not less than the minimum

prescribed by law, the number detailed for said court being the greatest number that could be convened without manifest injury to the service.

That thereafter, to wit, on the 5th day of April, 1900, at eleven o'clock a. m., being the earliest hour and date practicable, owing to the illness of the judge-advocate, said court-martial convened, and all of the members thereof were present.

That on said 5th day of April, 1900, the court proceeded to the trial of Captain Peter C. Deming, assistant commissary of subsistance, U. S. Volunteers. The said Peter C. Deming, being present in court, the order convening the court was read to said Deming, and the said Deming was then and there asked if he objected to being tried by any member present named therein, to which the said Deming replied in the negative.

Whereupon the members of said court-martial and the judge-advocate were then duly sworn. At the instance and request of said Deming in writing he was granted a delay, and the court thereupon, on motion, adjourned to meet at eleven o'clock a. m. on Thursday, the 12th day of April, A. D. 1900.

That thereafter, to wit, on the 12th day of April, A. D. 1900, said court met at 11 o'clock a. m., pursuant to adjournment. There were present all of the members of said court, the judge-advocate, Peter C. Deming, the accused, and his counsel. At the request of counsel for said Peter C. Deming, the court granted ten days' extension of time before proceeding with the trial of him, the said Deming, and thereupon the court adjourned to meet at 11 o'clock a. m., Monday, April 23rd, 1900.

That thereafter, to wit, on the 23rd day of April, 1900, said
8 court met pursuant to adjournment, at eleven o'clock a. m. at the Presidio of San Francisco, California, at which meeting all of the members of said court were present, the judge-advocate and Peter C. Deming, the accused. His counsel was also present.

The accused was then arraigned upon the following charges, to wit:

Charge I: "Embezzlement of public money of the United States, in violation of the 60th article of war."

Specification 1st: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, having on deposit to his official credit with the assistant treasurer of the United States at New York, certain public moneys of the United States, did for a purpose, not prescribed law, by his official check number 127922, dated March 13, 1900, made and drawn upon said assistant treasurer of the United States to the order of George V. Earnshaw, a clerk in the subsistence department, U. S. Army, willfully and with fraudulent intent cause it to appear that the United States was indebted to the said Earnshaw for pay for the month of February, 1900, in the sum of one hundred and fifty ($150.00) dollars, whereas said sum of money was not, nor any part thereof, due and payable from the United States to said Earnshaw, nor to any person, and in pursuance of his fraudulent intent, he, the said Captain Deming did forge the signature of said Earnshaw upon the reverse of said check, and on the 15th day of March, 1900, negotiate and transfer the same to one Samuel Hirschfelder, of San Francisco, California, for its full face value and did thereby withdraw, embezzle, and convert said money to his own use and benefit. This at San Francisco, California."

Specification 2nd: "In that he, Captain Peter C. Deming, assistant commissary, U. S. Volunteers, having certain sums of public money of the United States amounting in all to thirteen thousand ($13,000) dollars, more or less, lawfully committed to his custody, care, credit, and for disbursement and transfer in manner prescribed by law, and
9 having received a lawful order on the 7th day of March, 1900, from the Adjutant General, U. S. Army, to account for, transfer, and deliver the entire cash and credit balance of public money for which he, the said Captain Deming, was responsible as aforesaid, and having thereafter, to wit, on the 22 day of March, 1900, in pursuance of said lawful order, been called upon by Major W. H. Baldwin, commissary of subsistence, U. S. Army, with offer to assist him, said Captain Deming, to account for, transfer, and deliver said balance of public money, he, the said Captain Deming, did then and there fail to produce, pay over, or account for the sum of four thousand one hundred and seventy-nine and 48/100 ($4,179.48) dollars, and then and there embezzle and knowingly and wilfully misappropriate the same. This at San Francisco, California."

Charge II: "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification 1st: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, having on deposit to his official credit with the assistant treasurer of the United States at New York, certain public moneys of the United States, did in due form make his official check Number 127922, dated San Francisco, March 13, 1900, on the said assistant treasurer of the United States for one hundred and fifty dollars ($150.00), to the order of George V. Earnshaw, a clerk in the Subsistence Department, U. S. Army, for pay for the month of February, 1900, whereas, he, the said Captain Deming, well knew said sum of money was not, nor any part thereof, due and payabble from the United States to the said Earnshaw for the time stated; and in pursuance of his unlawful intent, he, the said Captain Deming, did falsely and deceitfully write the signature of the said Earnshaw on the back of said check, and by false and fraudulent statements on the 15th day of March, 1900, negotiate and transfer said check to one Samuel Hirschfelder, of San Francisco, California, and receive from said Hirschfelder the full face value of said check, in lawful money of the United States, and apply the same to his, said Captain Deming's, own use and benefit.
10 This at San Francisco, California."

Specification 2nd: "In that he, Captain Peter C. Deming, assistant commissary of subsistance, U. S. Volunteers, did fictitiously make a check upon the form prescribed for his use as a disbursing officer of the Subsistence Department, U. S. Army, in drawing against public money deposited to his credit with the assistant treasurer of the United States at New York, and did draw said check to his own order for the sum of one hundred and ten dollars ($110.00), said sum purporting to be for mileage, and did falsely and deceitfully, and with intent to defraud, sign the name of 'F. M. Coxe,' as maker of said check, thereby implying that the said false signature was the signature of Colonel F. M. Coxe, assistant paymaster-general, U. S. Army, and by endorsing his own signature on and uttering said false and fictitious check, he, the said

Captain Deming, did then and there attempt to injure and defraud one Dora Ogden. This at San Francisco, California, on or about March 17th, 1900."

Charge III: "Forgery, to the prejudice of good order and military discipline, in violation of the 62nd article of war."

Specification 1st: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, upon a check made by him and drawn in due official form upon the assistant treasurer of the United States, at New York, which said check in printed and written words is to the tenor following:

"WAR.

"State object for which drawn: "Commissaries.

"No. 127922. San Francisco, March 13, 1900.

"Assistant treasurer of the U. S., New York, pay to the order of George V. Ernshaw, one hundred and fifty and 0/100 dollars. $150.00.

"Salary for February, 1900.

"PETER C. DEMING,

"*Commissary of Subsistence, U. S. A.*,

did, without authority, falsely, deceitfully and feloniously write and forge the signature of George V. Earnshaw, a clerk in the Subsistence Department, U. S. Army, with the intent to defraud and injure one Samuel Hirschfelder. This at San Francisco, California, on the 15th day of March, 1900."

11

Specification 2nd: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, did make a fictitious check upon the form prescribed for his use as a disbursing officer of the Subsistence Department, U. S. Army, in drawing against public money deposited to his credit with the assistant treasurer of the United States at New York, to his own order, for the sum of one hundred and ten ($110.00) dollars, said sum purporting to be for mileage; and did falsely, deceitfully, and with intent to defraud, forge the name of 'F. M. Coxe' as maker of said check, thereby implying that the said false signature was the signature of Colonel F. M. Coxe, assistant paymaster-general, U. S. Army, said fictitious, false, and forged check being in printed and written words of the tenor following:

"WAR.

"State object for which drawn. "Commissaries.

"No. 127928. San Francisco, 3/17, 1000.

"Assistant treasurer of the U. S., New York, pay to the order of Peter C. Deming, one hundred and ten dollars.

"Mileage for Mar., $110.00.

"12-14-1900."

"F. M. COXE,

"*Commissary of Subsistence, U. S. A.*,

and by endorsing his own signature on said fictitious, false, and forged check, he, the said Captain Deming, did on or about the 19th day of March, 1900, at San Francisco, California, then and there attempt to injure and defraud one Dora Ogden.

"F. M. COXE,

"*Col. and Asst. Paymaster-General, U. S. A.*"

That thereupon Peter C. Deming, the accused, pleaded as follows to the above-named charges and specifications, to wit:

To the 1st specification, 1st charge, "guilty."
To the 2nd specification, 1st charge, "guilty."
To the 1st charge, "guilty."
To the 1st specification, 2nd charge, "guilty."
To the 2nd specification, 2nd charge, "guilty."
To the 2nd charge, "guilty."
To the 1st specification, 3rd charge, "guilty."
To the 2nd specification, 3rd charge, "guilty."
To the 3rd charge, "guilty."

Whereupon the prosecution rested, and Peter C. Deming, the accused, offered no evidence.

12 Whereupon the judge-advocate, the accused, and his counsel withdrew. The court was closed and found the accused, Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, guilty of the specifications and charges as follows:

Of the 1st specification, 1st charge, guilty.
Of the 2nd specification, 1st charge, guilty.
Of the 1st charge, guilty.
Of the 1st specification, 2nd charge, guilty.
Of the 2nd specification, 2nd charge, guilty.
Of the 2nd charge, guilty.
Of the 1st specification, 3rd charge, guilty.
Of the 3rd charge, guilty.

That thereupon said court-martial passed sentence upon said Peter C. Deming, on the charges and specifications aforesaid, which said sentence is in words and figures as follows, to wit:

"And the court does therefore sentence him, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, to be dismissed the service of the United States; to be confined in such penitentiary as the reviewing authority may direct, for the period of three (3) years; and that the crime, punishment, name, and place of abode of the accused shall be published in the newspapers in and about the city of San Francisco, California, and in the State where the accused usually resides.

"J. B. RAWLES,
"*Colonel 3rd Artillery, President.*

"S. W. GROESBECK,
"*Judge-Advocate, U. S. A.*"

The judge-advocate was then recalled, and the court, at 12.15 p. m., adjourned sine die.

That thereafter, to wit, on the 2nd day of May, A. D. 1900, the proceedings, finding, and sentence of said court-martial in the case of Peter C. Deming, assistant commissary of subsistence, United States Volunteers, were approved by William R. Shafter, major-general, United States Volunteers, commanding the Department of California, and submitted for the action of the President, pursuant to the provisions of article 106 of the Articles of War of the United States.

That thereafter, on the 8th day of June, A. D. 1900, said sen-
13 tence in the case of Peter C. Deming was confirmed by the President of the United States, and thereafter, on the 12th (?) day of

June, A. D. 1900, by direction of the Secretary of War, said Peter C. Deming ceased to be an officer of the Army, and the United States penitentiary at Fort Leavenworth, Kansas, was designated as the place for his confinement.

That the matters herein set forth by respondent may more fully appear to the court and proof of all material averments herein be made, a certified copy of the record and proceedings of said court-martial, duly authenticated under the laws of the United States, together with a copy of the order promulgating the proceedings, finding, and sentence in the case are hereto attached and made a part of respondent's return, marked Exhibits "A" and "B," respectively.

Wherefore respondent, in obedience of said writ of habeas corpus, now produces the body of said Peter C. Deming in court and states that said Deming is in his custody as warden of the United States penitentiary at Fort Leavenworth, Kansas, by virtue of a certain warrant or mittimus, as follows:

"By the direction of the Secretary of War, Peter C. Deming, assistant commissary of subsistence, United States Volunteers, ceases to be an officer of the Army from June 12th, 1900, and the United States penitentiary at Fort Leavenworth, Kansas, is designated as the place of his confinement, where he will be sent by the commanding general, department of California, under proper guard.

"By command of Lieutenant-General Miles.

"H. C. CORBIN, *Adjutant-General.*"

And having made full return, herewith prays the court to discharge said writ of habeas corpus and remand said Peter C. Deming to the custody of respondent as warden of the United States penitentiary at Fort Leavenworth, Kansas.

14 Respondent further says that the arrest, trial, and conviction of the said Peter C. Deming was had and done in all respects in conformity to and by authority of the rules prescribed by Congress for the government and regulation of the land and naval forces of the United States, which said rules were made by Congress under the power conferred by article 1, section 8, clause 14, of the Constitution of the United States, and that the detention and imprisonment of the said Peter C. Deming by this respondent is in conformity to and by authority of the warrant and mittimus issued in pursuance of said conviction and hereinbefore set forth in full.

ROBERT W. McCLAUGHRY,
Warden United States Penitentiary, Fort Leavenworth, Kansas.

15 EXHIBIT A.

UNITED STATES OF AMERICA,
WAR DEPARTMENT,
Washington, November 2, 1901.

I hereby certify that the sixteen pages hereto attached are a true copy of the record of the proceedings of a general court-martial remaining on file in the office of the Judge-Advocate-General United States Army.

GEO. B. DAVIS,
Judge-Advocate-General United States Army.

Be it known that George B. Davis, who signed the foregoing certificate, is the Judge-Advocate-General United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed, on this second day of November, one thousand nine hundred and one.

[SEAL.]

WM. CRARY SANGER,
Asst. Secretary of War.

16 *Record of a general court-martial.*

Proceedings of a general court-martial which convened at the presidio of San Francisco, California, pursuant to the following order:

Special Orders, No. 65. } HEADQUARTERS DEPARTMENT OF CALIFORNIA,
San Francisco, Cal., March 29, 1900.

* * * * * * *

7. A general court-martial is appointed to meet at the presidio of San Francisco, California, at 11 o'clock a. m. on Tuesday, the 3rd proximo, or as soon thereafter as practicable, for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers.

Detail for the court:

Colonel Jacob B. Rawles, 3rd Artillery.
Lieutenant-Colonel Richard I. Eskridge, 23rd Infantry.
Major Louis H. Rucker, 6th Cavalry.
Major Benjamin C. Lockwood, 21st Infantry.
Captain Frank West, 6th Cavalry.
Captain Carver Howland, 4th Infantry.
Captain Sedgwick Pratt, 3rd Artillery.
Captain Henry C. Danes, 3rd Artillery.
Capt. Chas. A. Bennett, 3rd Artillery.
Major Stephen W. Groesbeck, judge-advocate, U. S. Army, judge-advocate.

[Seal, office of Judge-Advocate-General, official copy, War Department.]

The court is empowered to proceed with the business before it with any number of members present not less than the minimum prescribed by law, the above being the greatest number than can be convened without manifest injury to the service.

* * * * * * *

17 By command of Major-General Shafter:

J. B. BABCOCK,
Assistant Adjutant-General.

PRESIDIO OF SAN FRANCISCO, CAL.,
April 5, 1900.

The court met at 11 o'clock a. m., the earliest hour and date practicable. The following official notice to the president of the court explains the delay:

"HEADQRS. DEPT. OF CALIF., *4/2, 1900.*

"Col. RAWLES,
"*3rd Arty., Angel Island, Cal.:*

"Owing to illness of the judge-advocate, it will not be necessary for the general court-martial for the trial of Captain H. C. Deming, commissary of subsistence, to meet to-morrow, the 3rd instant. Due notification will be sent you when this officer is for duty.

"J. B. BABCOCK, *A. A. Genl.*"

Present:
Colonel Jacob B. Rawles, 3rd Artillery;
Lieutenant-Colonel Richard I. Eskridge, 23rd Infantry;
Major Louis H. Rucker, 6th Cavalry;
Major Benjamin C. Lockwood, 21st Infantry;
Captain Frank West, 6th Cavalry;
Captain Carver Howland, 4th Infantry;
Captain Sedgwick Pratt, 3rd Artillery;
Captain Henry C. Danes, 3rd Artillery;
Captain Chas. A. Bennett, 3rd Artillery;
Major Stephen W. Groesbeck, judge-advocate, U. S. Army, judge-advocate.

The court then proceeded to the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, who, having
18 been brought before the court, stated that he had not been able to procure counsel, but that he would waive presence of counsel for the time being.

The order convening the court was read to the accused, and he was asked if he objected to being tried by any member present named therein, to which he replied in the negative.

The members of the court and the judge-advocate were then duly sworn.

The accused then moved for delay, and submitted the following written statement:

"SAN FRANCISCO, CALIF., *April 3rd, 1900.*

"The undersigned asks for a delay or continuance in the proceedings of the court until he receives important communications from the East bearing on this case, and engage counsel for his defense. Although every effort was made yesterday to see an attorney recommended, it will not be possible to complete arrangements until Thursday afternoon. In the meantime it is fully expected to receive papers and information which will relieve me from the accusations alleged, and therefore respectfully requests a continuance until Thursday next, April 12th.

"Respectfully,

"PETER C. DEMING,
"*Captain and C. S., U. S. V.*"

The court, upon motion, granted the delay and then adjourned to meet at 11 o'clock a. m. Thursday, the 12th instant.

S. W. GROESBECK,
Judge-Advocate, U. S. A.

19 THE PRESIDIO OF SAN FRANCISCO, CAL.,
April 12th, 1900.

The court met at 11 o'clock a. m., pursuant to adjournment.

Present: All the members and the judge-advocate.

The accused then asked leave to introduce Crittenden Thornton, attorney at law, as his counsel, which request was granted.

The JUDGE-ADVOCATE. Are you ready to proceed with the case this morning?

COUNSEL FOR THE ACCUSED. No, sir; I am not. I am of counsel for the accused in this case, and it becomes my duty—an unpleasant one—to appeal to the further generosity and consideration of the court in asking for a reasonable postponement of this trial. The accused in this case attempted to secure the services of another attorney, who had the matter under consideration for several days and then finally announced that it was impossible for him to undertake his defense. Upon Friday for the first time I met the gentleman for whom I now appear, and received a copy of the charges and specifications from him. We have had very few opportunities to consult on account of the place of his temporary detention, and I may say that altogether he has not been in my company more than three hours and a half since last Friday morning. Inasmuch as certain negotiations or consultations have taken place tending to abbreviate the proceedings of this court, and for that purpose only, I may say without prejudice to the interests of my client that those matters tend in the direction of simplifying the issues which will be brought before the court, and for withdrawing some things from the further hearing of the court on the ground that they will not be seriously contested. Moreover, an important change has been made within the last twenty-four hours in the charges and specifications—I refer to specification 2 under Charge I, in which the amount of an alleged conversion of the public funds committed to the accused in the course of his duty has been enlarged. The sum is much larger than that which we expected to have to explain or to meet or to justify. For those reasons simply, and with the assurance on my part to the court and to the judge-advocate that the granting of a reasonable postponement will not tend to lengthen,
20 but, on the contrary, greatly abbreviate the labors of this court, I apply for a postponement of this trial for the period of ten days.

The JUDGE-ADVOCATE. May it please the court, the original charges in this case were prepared without the necessary time to secure entire accuracy, and the first copy was handed to accused with the reservation that amended specifications might probably be furnished when the exact facts to be set forth should be obtained. The increase of the sum alleged to have been misappropriated is not very large—about $200, I believe.

COUNSEL FOR THE ACCUSED. Four hundred, I think.

The JUDGE-ADVOCATE. All the other matters stated by counsel have been accurately stated, and I think he has presented facts the merits of which are sufficient for granting a continuance. The only point I have to raise is whether the length of time—ten days—be really necessary.

COUNSEL FOR THE ACCUSED. The reason I apply for that length of time is that I have personal engagements which I can not postpone. If you will permit me to make certain inspections of accounts proceeding rom official sources in Washington, upon that inspection we may or

may not determine to introduce no evidence whatever. I am advised and believe that there are many things connected with that account which are susceptible of explanation and of palliation, and some probably of refutation. Therefore the labors of this court will be simplified and abbreviated by a reasonable opportunity being given me for this inspection; otherwise I should be compelled to take up a large portion of the time of this court in analyzing the accounts from day to day in the presence of the court.

The JUDGE-ADVOCATE. I am entirely willing to leave the issue with the court as presented.

The accused, his counsel, and the judge-advocate then withdrew, and the court was closed, and on being opened the president announced that the decision of the court was that ten days' extension of time be granted before proceeding with the trial.

The court then adjourned to meet at 11 a. m. Monday, April 23rd, 1900.

S. W. GROESBECK,
Judge-Advocate, U. S. A.

21 THE PRESIDIO OF SAN FRANCISCO, CAL.,
April 23, 1900.

The court met, pursuant to adjournment, at 11 o'clock a. m.

Present: All the members of the court and the judge-advocate.

The accused and his counsel were also present.

J. A. Vaughan was duly sworn as reporter.

The accused was then arraigned upon the following charges and specifications:

Charge I. "Embezzlement of public money of the United States, in violation of the 60th article of war."

Specification 1st. "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, having on deposit to his official credit with the assistant treasurer of the United States at New York, certain public moneys of the United States, did for a purpose, not prescribed law, by his official check number 127922, dated March 13, 1900, made and drawn upon said assistant treasurer of the United States to the order of George V. Earnshaw, a clerk in the subsistence department, U. S. Army, willfully and with fraudulent intent cause it to appear that the United States was indebted to the said Earnshaw for pay for the month of February, 1900, in the sum of one hundred and fifty ($150.00) dollars, whereas said sum of money was not, nor any part thereof, due and payable from the United States to said Earnshaw, nor to any person, and in pursuance of his fraudulent intent, he, the said Captain Deming did forge the signature of said Earnshaw upon the reverse of said check, and on the 15th day of March, 1900, negotiate and transfer the same to one Samuel Hirschfelder, of San Francisco, California, for its full face value and did thereby withdraw, embezzle, and convert said money to his own use and benefit. This at San Francisco, California."

Specification 2nd. "In that he, Captain Peter C. Deming, assistant commissary, U. S. Volunteers, having certain sums of public money of the United States amounting in all to thirteen thousand ($13,000) dollars, more or less, lawfully committed to his custody, care, credit, and for

disbursement and transfer in manner prescribed by law, and having received a lawful order on the 7th day of March, 1900, from
22 the Adjutant-General U. S. Army to account for, transfer, and deliver the entire cash and credit balance of public money for which he, the said Captain Deming, was responsible as aforesaid, and having thereafter, to wit, on the 22 day of March, 1900, in pursuance of said lawful order, been called upon by Major W. H. Baldwin, commissary of subsistence, U. S. Army, with offer to assist him, said Captain Deming, to account for, transfer, and deliver said balance of public money, he, the said Captain Deming, did then and there fail to produce, pay over, or account for the sum of four thousand one hundred and seventy-nine and 48/100 ($4,179.48) dollars, and then and there embezzle and knowingly and wilfully misappropriate the same. This at San Francisco, California."

Charge II. "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification 1st. "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, having on deposit to his official credit with the assistant treasurer of the United States at New York certain public moneys of the United States, did in due form make his official check number 127922, dated San Francisco, March 13, 1900, on the said assistant treasurer of the United States for one hundred and fifty dollars ($150.00) to the order of George V. Earnshaw, a clerk in the subsistence department, U. S. Army, for pay for the month of February, 1900, whereas he, the said Captain Deming, well knew said sum of money was not, nor any part thereof, due and payable from the United States to said Earnshaw for the time stated, and in pursuance of his unlawful intent he, the said Captain Deming, did falsely and deceitfully write the signature of the said Earnshaw on the back of said check and by false and fraudulent statements, on the 15th day of March, 1900, negotiate and transfer said check to one Samuel Hirschfelder, of San Francisco, California, and receive from said Hirschfelder the full face value of said check in lawful money of the United States and apply the same to his, said Captain Deming's, own use and benefit. This
23 at San Francisco, California."

Specification 2nd: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, did fictitiously make a check upon the form prescribed for his use as a disbursing officer of the Subsistence Department, U. S. Army, in drawing against public money deposited to his credit with the assistant treasurer of the United States, at New York, and did draw said check to his own order for the sum of one hundred and ten dollars ($110.00), said sum purporting to be for mileage, and did falsely and deceitfully and with intent to defraud, sign the name of 'F. M. Coxe' as maker of said check, thereby implying that the said false signature was the signature of Colonel F. M. Coxe, assistant paymaster-general, U. S. Army, and by endorsing his own signature on and uttering said false and fictitious check, he, the said Captain Deming, did then and there attempt to injure and defraud one Dora Ogden. This at San Francisco, California, on or about March 17th, 1900."

Charge III: "Forgery, to the prejudice of good order and military discipline, in violation of the 62nd article of war."

Specification 1st: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, upon a check made by him and drawn in due official form upon the assistant treasurer of the United States, at New York, which said check in printed and written words is to the tenor following:

"WAR.

"State object for which drawn. "Commissaries.

"No. 127922. San Francisco, March 13, 1900.

"Assistant treasurer of the U. S., New York, pay to the order of George V. Earnshaw one hundred and fifty and 0/100 dollars. $150.00.

"Salary for February, 1900.

"PETER C. DEMING,
"*Commissary of Subsistence, U. S. A.*

did without authority, falsely, deceitfully, and feloniously write and forge the signature of George V. Earnshaw, a clerk in the Subsistence Department, U. S. Army, with the intent to defraud and injure one
24 Samuel Hirschfelder. This at San Francisco, California, on the 15th day of March, 1900."

Specification 2nd: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, did make a fictitious check upon the form prescribed for his use as a disbursing officer of the Subsistence Department, U. S. Army, in drawing against public money deposited to his credit with the assistant treasurer of the United States, at New York, to his own order for the sum of one hundred and ten ($110.00) dollars, said sum purporting to be for mileage; and did falsely, deceitfully, and with intent to defraud, forge the name of 'F. M. Coxe' as maker of said check, thereby implying that the said false signature was the signature of Colonel F. M. Coxe, assistant paymaster-general, U. S. Army, said fictitious, false, and forged check being in printed and written words of the tenor following:

"WAR.

"State object for which drawn. "Commissaries.

"No. 127928. San Francisco, 3/17, 1900.

"Assistant treasurer of the U. S., New York, pay to the order of Peter C. Deming one hundred and ten dollars.

"Mileage for Mar., $110.00.

"12-14-1900.

"F. M. COXE,
"*Commissary of Subsistence, U. S. A.*

and by endorsing his own signature on said fictitious, false, and forged check, he, the said Captain Deming, did on or about the 19th day of March, 1900, at San Francisco, California, then and there attempt to injure and defraud one Dora Ogden.

"F. M. COXE,
"*Col. & Asst. Paymaster-General, U. S. A.*"

To which the accused pleaded as follows:
To the 1st specification, 1st charge, "guilty;"
To the 2nd specification, 1st charge, "guilty;"
To the 1st charge, "guilty;"

To the 1st specification, 2nd charge, "guilty;"
To the 2nd specification, 2nd charge, "guilty;"
To the 2nd charge, "guilty;"
To the 1st specification, 3rd charge, "guilty;"
To the 2nd specification, 3rd charge, "guilty;"
To the 3rd charge, "guilty."

The prosecution rests.

25 The COUNSEL FOR THE ACCUSED: The defense has no evidence to offer, except that I would like if the learned judge-advocate would state to the court whether or not, in regard to the charges to defraud private parties, complete restitution has been made to those persons, within his knowledge.

The JUDGE-ADVOCATE. It is not within my knowledge that such restitution has been made.

The COUNSEL FOR THE ACCUSED. I think the learned judge-advocate could have acquired that knowledge from his witnesses who are in attendance. If that is material for the court to know, and I think it is, in mitigation of his sentence, the witnesses might be called before the court and interrogated before the court.

The JUDGE-ADVOCATE. After consulting with Mr. Hirschfelder, who is present, I am advised that restitution has been made in his case. To the best of my knowledge and belief, it has also been made in the case of Dora Ogden. With respect to the moneys due the Government of the United States, no restitution has been made. Mr. Hirschfelder is in court, and if the court deem it material, he may be put upon the stand to testify to the point so far as he has personal knowledge. The prosecution does not deem it material.

The COUNSEL FOR THE ACCUSED. Nor does the counsel for the defense deem it material, except in mitigation of the sentence of the court.

The JUDGE-ADVOCATE. The prosecution is willing to grant that.

By the COURT. It is desired to know if there was total restitution.

The COUNSEL FOR THE ACCUSED. Total to all private persons. I do not construe the charges and specification in regard to Dora Ogden, that she was in fact defrauded, but as an attempt to defraud. With the permission of the court, while we are on this subject, I will call your attention, Mr. President and gentlemen; I read the concluding words of specification 2 of charge 3: "And by endorsing his own signature on and uttering said fictitious false and forged check, he, the said Captain Deming, did then and there, on or about the 19th day of March, 1900, at San Francisco, California, attempt to injure and defraud one Dora Ogden."

I do not understand that Mrs. Ogden was in fact defrauded, but the
26 request I made of my learned friend, the judge-advocate, was merely in mitigation of any sentence that you might in your wisdom impose. Certainly there was no money ever passed between Mrs. Ogden and the accused.

The JUDGE-ADVOCATE. In reply to counsel, the prosecution holds that it is not material in this matter. The charge being forgery, the only point for the court to determine is whether the facts alleged sustain the charge of forgery under the specification and charge here mentioned.

By the COURT. But you are willing to admit for the prosecution that restitution has been made to private parties?

The JUDGE-ADVOCATE. Yes, sir.

By the COURT. We do not think it is necessary to call any witnesses, inasmuch as the prosecution admits it.

THE COUNSEL FOR THE ACCUSED. I would like to call attention to the court that according to my construction of this charge, the last one, it does not charge a forgery, but charges an attempt to commit a forgery. For example, with the permission of the court, a man may write the name of another for unlawful purposes, and he may write it for fraudulent purposes, and an attempt to commit a forgery is not a forgery committed. A forgery consists of two acts, the fraudulent imitation of the signature of another and the passing of that signature to a third person, and therefore, it will materially affect your sentence under this last charge—that is, if your sentence will be called a distributive sentence. If there is a separate sentence, I would like to call your attention to the last specification of this charge, that it does not charge an actual fraud. It is an attempt. There is as much difference between an attempt to commit a forgery and a forgery in fact as there is between an attempt to commit murder and an actual killing.

The JUDGE-ADVOCATE. I would like to answer the learned counsel upon that point. Forgery may be committed in very many ways. The main point here for the court to consider, I apprehend, is this: the accused made a certain check upon a government blank—a printed form made especially for disbursing officers of the United States. It carried thereby an unusual power of deception. The mere making of that check with the intent to utter it or injure anybody is, within the meaning of
27 the law, forgery. With regard to the matter of attempt here, you can strike the word out, or let it remain, and it is not material. It has but little to do with the matter before the court. The question here is, Is the specification sufficient to maintain the allegation of forgery as laid? The prosecution simply holds, after consulting authorities, that there is no doubt of that whatever. It is a clear case.

The COUNSEL FOR THE ACCUSED. The accused submits the case, as far as he is concerned.

The JUDGE-ADVOCATE. As the accused has submitted his case, I have no further remarks.

The judge-advocate, the accused and his counsel withdrew, and the court was closed, and finds the accused, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers:

Of the 1st specification, 1st charge, guilty.
Of the 2nd specification, 1st charge, guilty.
Of the 1st charge, guilty.
Of the 1st specification, 2nd charge, guilty.
Of the 2nd specification, 2nd charge, guilty.
Of the 2nd charge, guilty.
Of the 1st specification, 3rd charge, guilty.
Of the 3rd charge, guilty.

And the court does therefore sentence him, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, to be dismissed the service of the United States, to be confined in such penitentiary as the reviewing authority may direct for the period of three (3) years; and that the crime, punishment, name, and place of abode of the accused

shall be published in the newspapers in and about the city of San Francisco, California, and in the State where the accused usually resides.

J. B. RAWLES,
Colonel 3rd Artillery, President.

S. W. GROESBECK,
Judge-Advocate, U. S. A.

28 The judge-advocate was then recalled, and the court, at 12.15 p. m., adjourned sine die.

J. B. RAWLES,
Colonel 3rd Artillery, President.

S. W. GROESBECK,
Judge-Advocate, U. S. A.

HEADQUARTERS DEPARTMENT OF CALIFORNIA,
San Francisco, Cal., May 2nd, 1900.

The proceedings, findings, and sentence in the foregoing case of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, are approved and respectfully submitted for the action of the President.

WM. R. SHAFTER,
Major-General, U. S. Vols., Commanding.

29 EXECUTIVE MANSION.

The sentence in the foregoing case of Captain Peter C. Deming, assistant commissary of subsistence, United States Volunteers, is confirmed and will be duly executed.

WILLIAM MCKINLEY.

June 8, 1900.

30 EXHIBIT B.

General Orders, No. 80.

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, June 8, 1900.

Before a general court-martial which convened at the Presidio, San Francisco, California, pursuant to Special Orders, No. 65, Department of California, March 29, 1900, and of which Colonel Jacob B. Rawles, 3d Artillery, was president, and Major Stephen W. Groesbeck, judge-advocate, U. S. Army, was judge-advocate, was arraigned and tried—

Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers.

Charge I: "Embezzlement of public money of the United States, in violation of the 60th article of war."

Specification 1st: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, having on deposit to his official credit with the assistant treasurer of the United States at New York certain public moneys of the United States, did, for a purpose not prescribed by law, by his official check, number 127922, dated March 13, 1900, made and drawn upon said assistant treasurer of the United States to the order of George V. Earnshaw, a clerk in the Subsistence Department, U. S. Army, wilfully and with fraudulent intent cause it to appear

that the United States was indebted to the said Earnshaw for pay for the month of February, 1900, in the sum of one hundred and fifty ($150.00) dollars, whereas said sum of money was not, nor any part thereof, due and payable from the United States to said Earnshaw, nor to any person; and in pursuance of his fraudulent intent he, the said Captain Deming, did forge the signature of said Earnshaw upon the reverse of said check, and on the 15th day of March, 1900, negotiate and transfer the same to one Samuel Hirschfelder, of San Francisco, California, for its full face value, and did thereby withdraw, embezzle, and convert said money to his own use and benefit. This at San Francisco, California."

Specification 2d: "In that he, Captain Peter C. Deming, assistant commissary, U. S. Volunteers, having certain sums of public money
31 of the United States, amounting in all to thirteen thousand ($13,000) dollars more or less, lawfully committed to his custody, care, credit, and for disbursement and transfer in manner prescribed by law, and having received a lawful order on the 7th day of March, 1900, from the Adjutant-General U. S. Army to account for, transfer, and deliver the entire cash and credit balance of public money for which he, the said Captain Deming, was responsible, as aforesaid, and having thereafter, to wit, on the 22nd day of March, 1900, in pursuance of said lawful order, been called upon by Major W. H. Baldwin, commissary of subsistence, U. S. Army, with offer to assist him, said Captain Deming, to account for, transfer, and deliver said balance of public money, he, the said Captain Deming, did then and there fail to produce, pay over, or account for the sum of four thousand one hundred and seventy-nine and $\frac{48}{100}$ ($4,179.48) dollars, and then and there embezzle and knowingly and wilfully misappropriate the same. This at San Francisco, California."

Charge II: "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification 1st. "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, having on deposit to his official credit with the assistant treasurer of the United States at New York certain public moneys of the United States, did in due form make his official check, number 127922, dated San Francisco, March 13, 1900, on the said assistant treasurer of the United States for one hundred and fifty dollars ($150.00) to the order of George V. Earnshaw, a clerk in the Subsistence Department, U. S. Army, for pay for the month of February, 1900, whereas he, the said Captain Deming, well knew said sum of money was not, nor any part thereof, due and payable from the United States to the said Earnshaw for the time stated, and in pursuance of his unlawful intent he, the said Captain Deming, did falsely and deceitfully write the signature of the said Earnshaw on the back of said check, and by false and fraudulent statements, on the 15th day of March, 1900, negotiate and transfer said check to one Samuel Hirschfelder, of San Francisco,
32 California, and receive from said Hirschfelder the full face value of said check in lawful money of the United States, and apply the same to his, said Captain Deming's, own use and benefit. This at San Francisco, California."

Specification 2d: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, did fictitiously make a check

upon the form prescribed for his use as a disbursing officer of the Subsistence Department, U. S. Army, in drawing against public money deposited to his credit with the assistant treasurer of the United States at New York, and did draw said check to his own order for the sum of one hundred and ten dollars ($110.00), said sum purporting to be for mileage, and did falsely and deceitfully and with intent to defraud sign the name of 'F. M. Coxe' as maker of said check, thereby implying that the said false signature was the signature of Colonel F. M. Coxe, assistant paymaster-general, U. S. Army, and by endorsing his own signature on and uttering said false and fictititous check he, the said Captain Deming, did then and there attempt to injure and defraud one Dora Ogden. This at San Francisco, California, on or about March 17, 1900."

Charge III: "Forgery, to the prejudice of good order and military discipline, in violation of the 62nd article of war.

Specification 1st: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, upon a check made by him and drawn in due official form upon the assistant treasurer of the United States at New York, which said check in printed and written words is to the tenor following:

"WAR.

"Commissaries.

"No. 127922.

"San Francisco, March 13, 1900.

"State object for which drawn: Salary for February, 1900.

"ASSISTANT TREASURER OF THE U. S., *New York.*

"Pay to the order of George V. Earnshaw one hundred and fifty and $\frac{0}{100}$ dollars ($150.00).

"PETER C. DEMING,
"*Commissary of Subsistence, U. S. A.*

did without authority falsely, deceitfully, and feloniously write and forge the signature of George V. Earnshaw, a clerk in the Subsistence Department, U. S. Army, with the intent to defraud and injure one Samuel Hirschfelder. This at San Francisco, California, on the 15th day of March, 1900."

33 Specification 2d: "In that he, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, did make a fictitious check upon the form prescribed for his use as a disbursing officer of the Subsistence Department, U. S. Army, in drawing against public money deposited to his credit with the assistant treasurer of the United States at New York, to his own order, for the sum of one hundred and ten ($110.00) dollars, said sum purporting to be for mileage; and did falsely, deceitfully, and with intent to defraud, forge the name of "F. M. Coxe" as maker of said check, thereby implying that the said false signature was the signature of Colonel F. M. Coxe, assistant paymaster-general, U. S. Army, said fictitious, false, and forged check being in printed and written words to the tenor following:

"WAR.

"Commissaries.

"No. 127928 San Francisco, 3, 17, 1900.

"State object for which drawn: Mileage for Mar. 12–14, 1900.

"ASSISTANT TREASURER OF THE U. S., *New York.*

"Pay to the order of Peter C. Deming, one hundred and ten dollars ($110.00).

"F. M. COXE,

"*Commissary of Subsistence, U. S. A.*

and by endorsing his own signature on said fictitious, false, and forged check, he, the said Captain Deming, did, on or about the 19th day of March, 1900, at San Francisco, California, then and there attempt to injure and defraud one Dora Ogden."

To which charges and specification the accused Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, pleaded as follows:

CHARGE I.

To the 1st specification, "guilty."
To the 2d specification, "guilty."
To the charge, "guilty."

CHARGE II.

To the 1st specification, "guilty."
To the 2d specification, "guilty."
To the charge, "guilty."

CHARGE III.

To the 1st specification, "guilty."
To the 2d specification, "guilty."
34 To the charge, "guilty."

FINDING.

CHARGE I.

Of the 1st specification, "guilty."
Of the 2d specification, "guilty."
Of the charge, "guilty."

CHARGE II.

Of the 1st specification, "guilty."
Of the 2d specification, "guilty."
Of the charge, "guilty."

CHARGE III.

Of the 1st specification, "guilty."
Of the 2d specification, "guilty."
Of the charge, "guilty."

SENTENCE.

And the court does therefore sentence him, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, "to be dismissed the service of the United States, to be confined in such penitentiary as the reviewing authority may direct for the period of three (3) years, and that the crime, punishment, name, and place of abode of the accused shall be published in the newspapers in and about the city of San Francisco, California, and in the State where the accused usually resides."

The record of the proceedings of the general court-martial in the foregoing case of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, having been submitted to the President, the following are his orders thereon:

EXECUTIVE MANSION, *June 8, 1900.*

The sentence in the foregoing case of Captain Peter C. Deming, assistant commissary of subsistence, United States Volunteers, is confirmed and will be duly executed.

WILLIAM MCKINLEY.

35 By direction of the Secretary of War, Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers, ceases to be an officer of the Army from June 12, 1900, and the United States penitentiary at Fort Leavenworth, Kansas, is designated as the place of his confinement, where he will be sent by the commanding general, Department of California, under proper guard.

By command of Lieutenant-General Miles:

H. C. CORBIN,
Adjutant-General.

(Endorsed:) No. 7951. Answer of respondent. Filed Feb'y 27th, 1902. Geo. F. Sharitt, clerk.

36 In the circuit court of appeals of the United States for the eighth circuit.

PETER C. DEMING, ON THE PETITION OF John H. Atwood, petitioner, appellant,
vs.
ROBERT W. MCCLAUGHRY, APPELLEE.

Demurrer.

Now comes the above-named petitioner and demurs to the return of the respondent in the above-entitled cause for the reason that the statements and averments in said return contained and contained in the exhibits attached thereto do not state facts sufficient to warrant the retention of the prisoner in custody nor the refusal of the writ of habeas corpus prayed for in the petition filed herein nor give the respondent any legal right to deprive the said Peter C. Deming of his liberty.

PETER C. DEMING,
By ATWOOD AND HOOPER,
Attorneys for Petitioner.

(Endorsed:) 7951. Deming, etc., vs. McClaughry. Demurrer to return. Filed Feb'y 27th, 1902. Geo. F. Sharitt, clerk.

37 United States courts of appeals, eighth circuit.

PETER C. DEMING, ON THE PETITION OF John H. Atwood, petitioner, appellant,
vs.
ROBERT W. MCCLAUGHRY, WARDEN OF the United States penitentiary at Fort Leavenworth, Kansas, appellee.

Appeal from the circuit court of the United States for the district of Kansas.

ORDER.

On this 27th day of February, 1902, came the parties hereto in person and by their respective counsel and thereupon this cause came on for hearing upon the writ and the return thereto and the demurrer of the petitioner filed to said return, and the court being well advised in the premises now sustains said demurrer.

Now, therefore, it is by the court considered, ordered, and adjudged that the detention of the said Peter C. Deming is unlawful and without warrant or authority of law and he is hereby discharged, and the said respondent, Robert W. McClaughry, is hereby ordered and directed to release said Deming. To which ruling and decision of the court the respondent at the time duly excepted and gave notice and made application for an appeal to the Supreme Court of the United States, which appeal is allowed.

Thereupon it is further ordered by the court that the said Peter C. Deming give a good and sufficient bond in the penal sum of two thousand dollars, conditioned as provided by law, that he will abide the result of said appeal and shall surrender himself in execution of the judgment and order of said court, and that until the giving and approval of said bond by this court or the judge thereof the said Peter C. Deming is hereby remanded to the custody of the said respondent, Robert W. McClaughry.

WILLIAM C. HOOK, *Judge.*

(Endorsed:) 7951. Order discharging petitioner, etc. Filed Feb'y 27, 1902. Geo. F. Sharitt, clerk.

38 In the circuit court of the United States for the district of Kansas, first division.

J. H. ATWOOD, PETITIONER, ON BEHALF OF Peter C. Deming,
v.
R. W. MCCLAUGHRY.

Assignment of error.

Comes now the defendant in the above-entitled cause and assigns error in the decision and judgment of the said circuit court in said cause, as follows:

I.

That said court erred in deciding the demurrer interposed by the petitioner and plaintiff to the return to the writ of habeas corpus filed by

said defendant in said cause, and in holding and deciding that the facts set forth in said return to said writ of habeas corpus did not constitute sufficient justification and grounds and authority of law to justify the said defendant, R. W. McClaughry, in detaining said petitioner, Peter C. Deming, as a prisoner in the United States penitentiary at Fort Leavenworth, Kansas, and the said court erred in holding that said defendant was entitled to his release from the custody of the said R. W. McClaughry, notwithstanding the existence of the facts stated in said return of the said R. W. McClaughry to the said writ of habeas corpus issued in this case.

Wherefore the said defendant prays that the judgment of said court be reversed, and that said defendant be restored to all rights he has lost thereby.

J. S. DEAN,
U. S. Atty. for R. W. McClaughry.

(Endorsed:) No. 7951. Assignment of errors. Filed Feb'y 27th, 1902.

39 In the circuit court of the United States for the district of Kansas.

J. H. ATWOOD, PETITIONER ON BEHALF OF Peter C. Deming, petitioner,
vs.
R. W. MCCLAUGHRY, AS WARDEN OF THE United States penitentiary at Fort Leavenworth, Kansas, defendant.

Petition for appeal.

Now comes the above-named defendant, and on his own behalf and on behalf of the United States of America says that on the 27 day of Feb'y, 1902, this court entered an order and judgment herein in favor of the said petitioner for the discharge of said petitioner and against this defendant for costs, in which proceedings, judgment, and order certain errors were committed to the prejudice of the said defendant and the United States of America, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore this defendant for himself, and on behalf of the United States of America, prays that an appeal and writ of error may issue in his behalf and in behalf of the United States of America to the Supreme Court of the United States for the correction of said errors so complained of, and that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

J. S. DEAN,
U. S. Att'y for Defendant.

Appeal allowed.

WILLIAM C. HOOK, *Judge.*

(Endorsed:) No. 7951, in re Peter C. Deming. Petition for appeal and allowance thereof. Filed Feb. 27th, 1902. Geo. F. Sharitt, clerk.

40 Know all men by these presents that we, Peter C. Deming as principal and Cornelia W. Deming and George Wadsworth as

sureties, are held and firmly bound unto the United States of America in the full and just sum of two thousand dollars to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated this 5th day of March in the year of our Lord one thousand nine hundred and two.

Whereas lately at the November term, A. D. 1901, of the circuit court of the United States for the first division of the district of Kansas, in a certain cause pending in said court, the same being a proceeding for a writ of habeas corpus to secure the discharge from imprisonment of one Peter C. Deming, in which cause John H. Atwood was petitioner on behalf of said Deming and R. W. McClaughry, the warden of the United States penitentiary at Fort Leavenworth, Kansas, was defendant, it was ordered that a writ of habeas corpus issue, and upon said defendant's return to said writ and the further hearing of said cause it was adjudged by said circuit court that said Peter C. Deming be released and discharged from custody and imprisonment; and

Whereas the said defendant, R. W. McClaughry, in his own behalf and on behalf of the United States of America, has made application for and had an appeal allowed by said circuit court to the Supreme Court of the United States, and said Deming has applied to be released pending such appeal and until the determination thereof and in that behalf tenders this bond.

Now, the condition of the above obligation is such that if the said Peter C. Deming shall abide the result of said appeal and shall surrender himself in execution of and in compliance with the judgment and order of the Supreme Court of the United States and of said circuit court or either of said courts as the case may be and at such time and place as may be ordered by said courts or either of them and
41 abide and perform any and all judgments or orders hereafter made in said cause, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

PETER C. DEMING. [SEAL.]
CORNELIA W. DEMING. [SEAL.]
GEORGE WADSWORTH. [SEAL.]

Witness to Deming:
W. W. HOOPER.

Taken and acknowledged before me on the day and year first above written.

JOHN R. HAZEL,
Judge of the United States District Court,
Western District of New York.

Sufficiency of bonds to the amount approved, March 5th, 1902.
JOHN R. HAZEL, *U. S. J.*

Attest:
[SEAL.] GEO. R. KEATING, *Clerk.*

Approved.

WILLIAM C. HOOK,
United States District Judge, Kansas.

42 UNITED STATES OF AMERICA,
Western district of New York, ss:

Cornelia W. Deming, a surety on the annexed recognizance, being duly sworn, deposes and says: That she resides at Buffalo, Erie County, New York, in the western district of New York; that she is a freeholder in the county of Erie, New York; that she is worth the sum of four thousand dollars over and above all her just debts and liabilities in property subject to execution and sale, and that her property consists of a house and lot situate in the city of Buffalo, Erie County, New York, known as 158 Sumner street; that the same is worth twenty thousand dollars over and above all incumbrances thereon.

CORNELIA W. DEMING.

Sworn and subscribed before me this 5th day of March, 1902.

JOHN R. HAZEL, *U. S. J.*

UNITED STATES OF AMERICA,
Western district of New York, ss:

George Wadsworth, a surety on the annexed recognizance, being duly sworn, deposes and says: That he resides at Buffalo, Erie County, New York, in the western district of New York; that he is a freeholder in the county of Erie, New York; that he is worth the sum of four thousand dollars over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists in part of a house and lot situate in the city of Buffalo, county of Erie, and State of New York, known as No. 30 Arlington Place, and that the same is worth eight thousand dollars over and above all incumbrances thereon.

GEORGE WADSWORTH.

Subscribed and sworn to before me this 5th day of March, 1902.

JOHN R. HAZEL, *U. S. J.*

43 (Endorsed:) No. 7951, Peter C. Deming, etc., vs. R. W. McClaughry. Bond. Filed Mar. 8th, 1902. Geo. F. Sharitt, clerk.

44 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings in said court in case No. 7951, wherein Peter C. Deming, on the petition of Jno. H. Atwood, is the petitioner and Robert W. McClaughry is the respondent.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 19th day of March, A. D. 1902.

[SEAL.] GEO. F. SHARITT, *Clerk.*

(Indorsement on cover:) File No. 18463. Kansas C. C. U. S. Term No., 610. R. W. McClaughry, as warden of the United States penitentiary at Fort Leavenworth, Kansas, appellant, vs. Peter C. Deming. Filed March 26", 1902.

O

No. 610.

Motion to advance.

Office Supreme Court U.S.
FILED
APR 5 1902
JAMES H. McKENNEY
Clerk.

Filed April 5, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

ROBERT W. McCLAUGHRY, APPELLANT,
v.
PETER C. DEMING.
} No. 610.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

ROBERT W. McCLAUGHRY, APPELLANT,
v.
PETER C. DEMING.
No. 610.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION TO ADVANCE.

The appellee in the above-entitled case, Peter C. Deming, was a captain in the Subsistence Department of the Volunteer Army of the United States. On April 3, 1900, a general court-martial was convened at San Francisco, Cal., to try him on certain charges and specifications in which he was charged with embezzlement and forgery. He was arraigned, made no objection to the composition of the court, pleaded guilty, was convicted, and sentenced to dismissal from the service of the United States and to confinement in the penitentiary for three years, which sentence was approved by the Secretary of War and confirmed by the President of the United States.

It was claimed on behalf of petitioner that General Shafter, who is a retired officer of the Regular Army,

had no authority to convene the court which tried him, and that said court was not regularly constituted or organized, in that it was composed entirely of officers of the Regular Army, who were expressly prohibited to hear or determine any charge against him, an officer of the Volunteer Army, under the seventy-seventh article of war (section 1342, R. S.), which reads:

> Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article 78.

the Government, on the other hand, contending on behalf of the respondent, McClaughry, the warden of the penitentiary, that the Volunteer Army, of which the petitioner was an officer at the time of his trial, conviction, and imprisonment, was not "other forces" within the meaning of article 77. Petitioner for this and other reasons claimed that he was deprived of his liberty without due process of law, and in violation of his rights under the Constitution, and thereupon filed his petition for a writ of habeas corpus, which on hearing was denied. On appeal to the circuit court of appeals the decision of the circuit court was reversed and the case remanded with orders to issue the writ and discharge the prisoner. From the order to the circuit court discharging the petitioner this appeal is taken. The petitioner has been released on bail in the sum of $2,000.

This case is one of unusual and grave importance. Several hundred officers and men who served in the

Volunteer Army during the Spanish war and thereafter up to June 30, 1901, were tried, convicted, and sentenced by tribunals composed, wholly or in part, of officers of the Regular Army. Several have already been released by habeas corpus proceedings, and others, again, released on bail, pending the decision of this case. Furthermore, the War Department is proceeding in like manner in other cases. If the practice of the Government in this respect is illegal and void, it is of the highest importance to the good order of the Army that it shall be determined as promptly as possible. For these reasons the Solicitor-General, notwithstanding the lateness of the application, feels constrained to ask the court to advance the case on the docket for hearing during the present term on such day as may be convenient to the court.

Opposing counsel concur in this application, and both sides can be ready within a week to present the case to the court.

J. K. RICHARDS,
Solicitor-General.

O

No. 610.

Br. of Atty. Gen. (Brodie) Co

Appellant.

Filed Apr. 19, 1902.

Office Supreme Court U. S.
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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

R. W. McCLAUGHRY, AS WARDEN OF THE United States Penitentiary at Fort Leavenworth, Kansas, appellant,
v.
PETER C. DEMING.
No. 610.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF ON BEHALF OF THE APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

R. W. McCLAUGHRY, AS WARDEN OF THE United States Penitentiary at Fort Leavenworth, Kansas, appellant,
v.
PETER C. DEMING.
No. 610.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF ON BEHALF OF THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal by the warden of the penitentiary at Fort Leavenworth, Kans., from an order of the circuit court of the United States for that district, entered February 27, 1902, directing the discharge of Peter C. Deming, on the petition of John Atwood for a writ of habeas corpus (Rec., p. 23).

On March 29, 1900 (Special Orders, No. 65), a general court-martial was appointed by William R. Shafter, major-general, United States Volunteer Army, and brigadier-general, United States Army, retired, to meet at San Francisco, Cal., to try Peter C. Deming,

the appellee herein, a captain in the subsistence department of the Volunteer Army of the United States. The court so convened was constituted entirely of Regular Army officers (Rec., p. 2). Thereafter, to wit, on April 5, 1900, the said court proceeded to the trial of said Deming; "the said Peter C. Deming, being present in court, the order convening the court was read to said Deming, and said Deming was then and there asked if he objected to being tried by any members present named therein, to which the said Deming replied in the negative" (Rec., p. 5).

Deming was charged with (1) "embezzlement of public money of the United States, in violation of the sixtieth article of war," under two specifications (Rec., p. 5); (2) "conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war," under two specifications (Rec., p. 6); (3) "forgery, to the prejudice of good order and military discipline, in violation of the sixty-second article of war," under two specifications (Rec., p. 7). Deming pleaded guilty to each of these charges and the specifications thereunder (Rec., p. 8), and was thereupon sentenced "to be dismissed from the service of the United States, to be confined in such penitentiary as the reviewing authority may direct for a period of three years, and that the crime, punishment, name, and place of abode of the accused shall be published in the newspapers in and about the city of San Francisco, Cal., and in the State where the accused usually resides" (Rec., p. 8). This sentence was approved by General Shafter on May 2, 1900, and confirmed by the President of the United

States on June 8, 1900 (Rec., p. 18). By direction of the Secretary of War Deming ceased to be an officer of the Army from June 12, 1900, and the penitentiary at Fort Leavenworth was designated as the place of his confinement under said sentence (Rec., p. 22).

Thereafter, on September 11, 1901, John H. Atwood, on behalf of Deming, filed a petition for a writ of *habeas corpus* in the circuit court of the United States for the district of Kansas, setting forth that Deming was then imprisoned and restrained of his liberty by the appellant herein; that the sentence of said court-martial, by virtue of which he was confined, was in direct violation of the seventy-seventh article of war (sec. 1342 R. S.), which provides that "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces," etc.; and that consequently said Deming was "tried and convicted without due process of law and in violation of the fifth amendment to the Constitution of the United States." (Rec., p. 2.)

Although it is not so shown in the record it may not be improper here to say that, after hearing upon the writ of habeas corpus which was issued in accordance with the foregoing petition, the said writ was discharged, and that upon appeal to the circuit court of appeals that court reversed the order of the circuit court and directed that the writ issue, and that said Deming be discharged from custody. Thereafter, in accordance with the judgment of the circuit court of appeals, Deming was discharged, and from the order of the court so discharging him this appeal is taken. (Rec., p. 23.)

SYNOPSIS OF ARGUMENT.

In presenting the Government's side of the case we shall discuss the following propositions:

FIRST PROPOSITION.

That the Volunteer Army of 1899, of which petitioner was an officer at the time of his trial, conviction, and sentence, as above set forth, was not "other forces" within the meaning of article 77 of the Articles of War.

SECOND PROPOSITION.

That even if the petitioner were to be treated as an officer of "other forces" within the meaning of said article 77, that fact would not deprive the court-martial of regular officers which tried him of jurisdiction. This article relates entirely to the competency of members of a court-martial, not at all to its jurisdiction.

THIRD PROPOSITION.

The court-martial having jurisdiction and acting within its powers, its proceedings can not be assailed by habeas corpus.

ARGUMENT.

FIRST PROPOSITION.

That the Volunteer Army of 1899, of which petitioner was an officer at the time of his trial, conviction, and sentence, as above set forth, was not "other forces" within the meaning of article 77 of the Articles of War.

The contention is not that this Volunteer Army was one force with the Regular Army for all purposes, but that it was not "other forces" than the Regular Army within the meaning of an article of war that had to do

with the enforcement of discipline through trials by court-martial.

Whether or not this proposition is correct depends wholly upon the interpretation to be placed upon the words "other forces" as used in the seventy-seventh article of war.

The term "Army of the United States" as employed in legislation designates, in time of peace, the Regular Army only (sec. 1094, R. S.), and in time of war the Regular Army and Volunteer Army (act of April 22, 1898, sec. 2). In a broader sense the term includes also the militia when called into active service of the United States (Digest Op. J. A. G., p. 691), and likewise the Marine Corps when detached by order of the President for service with the Army (sec. 1619, R. S.; sec. 1342, R. S., art. 78). The four classes of troops which thus in the aggregate make up the Army of the United States in time of war are:

(1) The Regular Army.

(2) The Volunteer Army.

(3) The militia in active service of the United States.

(4) The Marine Corps when detached and placed upon duty with the Army by order of the President of the United States.

The seventy-seventh article of war provides as follows:

> ARTICLE 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces, except as provided in article 78.

The application of the term "other forces" employed in this article must be to one or more of the three classes of troops last above mentioned; which of these are included within that designation can be answered only by a consideration of the characteristics of each.

REGULAR ARMY.

The Regular Army of the United States has its origin in the general authority conferred by the Constitution upon Congress, to raise and support armies and to make rules and regulations for their government (art. 1, sec. 8, clauses 12–14). Legislation was enacted by Congress as early as 1799, under the general authority here referred to, recognizing and adapting to the Constitution of the United States the establishment of the troops raised under the resolves of the Congress prior to the adoption of the Constitution. This legislation marked the beginning of the Regular Army of the United States, and such an army has ever since been maintained under permanent legislation. The term "Regular Army" means simply "standing army," or that military organization which it is the intention to maintain without regard to whether the country is at peace or at war. It is made up of men who engage *voluntarily and directly* with the United States to serve, not indirectly, through the agency of the States, as in the case of the militia. As a military organization, the Regular Army may be sent anywhere within or without our territorial bound, and may therefore be employed not only for the execution of the laws of the union, suppression of

insurrection, and the repelling of invasion, as in the case of the militia, but as well for invading foreign territory, occupying and governing the same, and for any of the manifold purposes for which a sovereign nation may employ an army under international law.

MILITIA.

The militia has its origin in those provisions of the Constitution which confer upon Congress the authority to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion, and for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. To the States is reserved the appointment of officers, and the authority to train the militia in the discipline prescribed by Congress (art. 1, sec. 8, clauses 15–16).

Under the authority of these provisions of the Constitution, Congress enacted the militia law of 1792, which prescribed the organization, drill, and discipline of the militia, and conferred upon the President the authority to call them into the service of the General Government in such numbers as he may determine. Under these constitutional provisions and laws the use of the militia by the General Government is restricted to a time of war or public danger, and to the accomplishment of three purposes: (1) The execution of the laws of the Union; (2) the suppression of insurrection; and (3) the repelling of invasion. The militia may therefore not be used, legally, outside our territorial limits for carrying on a war of invasion, but

is purely a domestic force; and under all circumstances, whether in the State service or in the service of the General Government, the militia retains the essential characteristics of State troops. When we consider the restricted use which may be made of the militia in active service of the United States, and that the authority for its maintenance is derived from a wholly separate and distinct provision of the Constitution from that under which the Regular Army is maintained, it seems very plain that the militia should be held to be "other forces" within the meaning of the seventy-seventh article of war.

MARINE CORPS.

This corps under earlier legislation had an undefined position (2 Op. Atty. Gen., 357). It was sometimes regarded as belonging to the Army (id., 239–241, 353; id., 117), and sometimes as an adjunct of the Navy (1 id., 381; 2 id., 78; 5 id., 705; *Wilkes* v. *Dinsman*, 7 How., 125). It appears to have been assimilated to the Army as to organization, discipline, and pay (Winthrop, vol. 1, p. 94). Later it was definitely incorporated with the Navy (act of June 30, 1834, sec. 1621, R. S.), and has since that date been maintained by the Government under a separate and distinct provision of the Constitution authorizing Congress to provide and maintain a Navy (art. 1, sec. 8, clause 11). It is recognized in article 77 as falling within the designation "other forces" in the exception which that article provides, by the terms of which officers of this corps, detached for service with the Army by order of the

President, and when thus detached only, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to the forces of the Marine Corps so detached.

VOLUNTEERS.

The militia called into actual service of the General Government and the Marine Corps are thus clearly other forces within the meaning of the seventy-seventh article of war, and the only difficulty we have in applying the article is to the remaining class of troops, to wit, volunteers. The term "volunteers" has generally designated those temporary military organizations or bodies of men, other than the militia in active service, which the Government employs and maintains temporarily in the military service in time of war or public danger. It is not so easy to state the characteristics of volunteers, for the reason that there has never been, as in the case of militia and regulars, standing or permanent legislation concerning them. It seems to have always been the policy of the Government to resort to special legislation after an emergency had arisen calling for the use of a large army under which volunteers have been called into the service. In consequence their character has varied. It may be stated generally that the special acts resorted to in the earlier periods of our history down to and including the civil war period gave to the volunteer armies organized thereunder the characteristics of militia in actual service, and the War Department appears to

have held under an article of war then in force (article 97, code of 1806) that as to trial by courts-martial these earlier volunteer armies were to be regarded as synonymous with the militia forces in actual service, and that the requirement of said article that courts-martial for the trial of troops other than regulars should be by "militia officers only" would be satisfied by constituting such courts of either volunteer or militia officers. The special legislation resorted to in 1899 to create the volunteer army of that year—the one to which the petitioner belonged at the time of his trial, conviction, and sentence—gave that army the character of a provisional force supplemental to the Regular Army, and the War Department held under the articles of war then in force (article 77, code of 1874) that this particular volunteer army was not within the designation "other forces" within the meaning of said article 77, and was therefore triable, like regulars, by courts-martial composed of officers of any authorized forces.

It appears from the foregoing statement that the view of the War Department has been that the revision of the statutes in 1874 effected no change in the law as to trial by courts-martial of troops other than regulars; that the new and existing seventy-seventh article of war was, in effect, a reenactment of the old article 97; that both before and since the revision of 1874 the question whether any particular volunteer army was subject to trial by court-martial as regulars or militia must be determined by reference to the legislation under which such army was raised. If under

this legislation it had the essential characteristics of the militia, the officers and soldiers composing it were exempt from trial by officers of the Regular Army. If, on the contrary, it was assimilated in status and organization to the regulars rather than the militia, they were triable, like regulars, by courts-martial composed of officers of either regulars or volunteers. A discussion of this earlier legislation follows; first, of the earlier articles of war:

(*a*) *The purpose of the earlier Articles of War was to secure to troops contributed to the General Government by the States trial by their own State officers.*

PARENT BRITISH CODE.

The parent British code, from which the earliest American articles were taken, contained no provision expressly disqualifying any particular class of officers from sitting on courts-martial. All the contingents which made up the army of Great Britain were subjected, equally with the permanent royal establishment, to the articles of war, and courts-martial for the trial of offenders might be constituted from commissioned officers selected indiscriminately from any of the authorized forces.

FIRST AMERICAN ARTICLES. CODE OF 1775.

The first American articles were prepared by a special committee appointed by the Continental Congress, of which committee General Washington was president, and were enacted by that Congress in June of 1775. Like the British articles, from which they

were largely taken, they contained no provision disqualifying any particular class of officers from sitting on courts-martial, all the component branches of the Continental Army being subjected equally to the operation of these articles.

SECOND AMERICAN ARTICLES. CODE OF 1776.

The articles of 1775 did not remain long in force. On June 14, 1776, the Continental Congress directed the Committee on Spies, of which Adams and Jefferson were members, to report a revision of the Rules and Articles of War, and in September of that year, upon the report of said committee, enacted what is known as the Military Code of 1776. It is in these articles that we find the first expression of a rule of disqualification of officers of the regular forces to sit upon courts-martial for the trial of certain classes of troops, the provisions in this respect being as follows:

> SEC. 17, ART. 1. The officers and soldiers of any troops, whether minute men, militia, or others, being mustered and in Continental pay, shall, at all times, and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these Rules or Articles of War, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.
>
> That such militia and minute men as are now in service, and have, by particular contract with the respective States, engaged to be

governed by particular regulations while in Continental service, shall not be subject to the above Articles of War. (See Winthrop's Military Law and Precedents, vol. 2, p. 1501.)

The purpose and intent of the foregoing article of war are not difficult to discern. It was not, as intimated by the court below, to guard against the feeling of jealousy and distrust with which the professional soldier was regarded, for the reasons (1) that the so-called regular forces of the Revolutionary war period were not made up of professional soldiers, but of citizens who voluntarily left their civil pursuits for short periods of service, and who in every material regard resembled the volunteers of later wars, and (2) because the article guarded quite as effectively against trial by officers belonging to the contingents of other States, as to whom no such feeling of jealousy or distrust could have been entertained, as it did against trial by officers of the regular forces. The language of the article indicates a very different intent. It was an expression in military legislation of a political doctrine generally urged at that time in an extreme form that each State should be, to the greatest extent practicable, self-governing. The article was in effect an assertion by a State of control over its own troops in Continental service and pay, not only against the Government of the Confederation, but against the government of any other State, and, as held by the judge-advocate-general in an opinion rendered June 28, 1898, its purpose was to secure to State troops trial by their own officers. (Appendix 2, p. 7.) If jealousy or distrust were the

basis of the article, it was not directed specially to the military arm of the central Government, but to the central Government itself, to which absolutely necessary powers, civil or military, were conceded by the States, with the greatest reluctance.

The articles of 1776, with unimportant amendments, none of which affected the article in reference, remained in force during the Revolutionary war and for a period of about seventeen years after the organization of the Government under the Constitution (until 1806). During this period the Regular Army was created (act of September 29, 1799, 1 Stat., 93), and the militia was several times called into active service of the United States under general militia laws of 1792–1795 (1 Stat., 367; id., 403; id., 522; 2 Stat., 241; id., 383). The acceptance of volunteers was likewise authorized during this period by act of March 3, 1791, section 8 (1 Stat., 223), and notably by act of May 28, 1798 (1 Stat., 558), and the acts supplementary and amendatory thereto of June 22, 1798, and March 2, 1799, section 6 (1 Stat., pp. 578, 726), when in view of possible war with France the President was authorized to raise a provisional army of volunteers of 10,000 men. An examination of this legislation shows that the volunteers authorized were in effect detachments from the militia, differing in no material regard from the latter. In fact, in all this earlier legislation there is confusion in the use of the terms "militia" and "volunteers," and failure to distinguish clearly between these two classes of troops. None of the organizations of volunteers, so called, authorized by the legislation

here in reference, was actually received into the service of the General Government and organized as United States troops, and there arose, therefore, no occasion for interpreting and applying section 17, article 1, above quoted, to them.

THIRD AMERICAN ARTICLES. CODE OF 1806.

Congress, by act of April 30, 1806, entitled "An act for establishing rules and articles for the government of the armies of the United States," enacted a new military code generally designated "The Articles of 1806." The provisions of the articles of 1776 above quoted appear in this new code in the following form:

> ART. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by the courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers.

This article omits the concluding clause of the corresponding article of the Code of 1776, above quoted, in respect of the exemption from the articles of war of troops under contract with the respective States to be governed by particular regulations while in Continental service. In all other respects it is substantially identical with that article, with the single exception that the

requirement of the latter that courts for the trial of "minute men, militia or others * * * shall be composed entirely of militia officers *of the same provincial corps with the offender*," is modified by omitting the italicized words.

The Regular Army at the time of the enactment of article 97 was composed of the equivalent of three small regiments, of an aggregate strength of about 3,000 men (2 Stat., 132), and its average strength, prior to 1806, had not much exceeded these numbers. Contemporary history does not inform us that there existed toward this small body of soldiers any jealousy or distrust, and it is not reasonable to presume that the article was in any degree based upon any prejudice against the Regular Army as a body. The article remained, as before, an assertion of control by the States over the troops furnished the General Government and its purpose to secure to State troops trial by their own officers, the only modification being that the right was conceded to constitute courts-martial for the trial of offenders belonging to the contingent of any particular State of officers selected indiscriminately from any of the State contingents.

The articles of 1806, unamended in respect of article 97 above quoted, continued in force until the revision of 1874, and constituted, therefore, the governing military code during the war of 1812, the Mexican war, the war with the Seminoles, and the war of the rebellion. Volunteer armies were raised during each of these wars by special acts of Congress: For

the war of 1812 by the act of February 6 of that year (2 Stat., 676); for the Seminole war by the act of May 23, 1836 (5 Stat., 32); for the war with Mexico by the act of May 13, 1846 (9 Stat., 9). During the war of the rebellion volunteer troops were called out first under the President's proclamation of May 3, 1861 (12 Stat., 1260), and later under the acts of July 22 and 25, 1861 (12 Stat., 268, 274), and of July 17, 1862 (12 Stat., 598); also under the enrollment act of March 3, 1863 (12 Stat., 731), and acts amendatory thereto of February 24 and July 4, 1864, and March 3, 1865 (13 Stat., 6, 379, 487), popularly known as the Draft Acts.

The more relevant provisions of the foregoing acts, with extracts from Executive proclamations and supplementary general orders of the War Department, showing in detail the administrative methods pursued in raising certain of these volunteer armies, are inserted as Appendix 1 to this brief. An examination of these several acts shows:

(*b*) *That their effect was to invest the volunteer armies raised under their provisions with the characteristics of State troops, assimilating them in this regard to the militia in actual service.*

The very close connection between the volunteer armies of the war of 1812 and the Seminole war and the militia, and that these volunteer armies were in effect detachments from the militia, is very clearly revealed by an examination of the acts under which they were raised, and which contemplated that the

volunteers authorized might be drawn from the already organized militia or taken from the body of the people; that in either event, and until called into actual service of the General Government, the accepted organizations should "be bound to do regular militia duty as is required by law in like manner as before the passage of this act." (Appendix 1, p. 61) The quoted provision appears in the act of May 3, 1836, in the following form: "But, until called into actual service, such companies, battalions, squadrons, regiments, brigades, or divisions shall not be considered as exempt from the performance of militia duty as required by law in like manner as before the passage of this act." (Appendix 1, p. 64) That the volunteer troops called out during these two wars and the subsequent war with Mexico were in effect State troops is shown by the provisions of these acts that—

> the said volunteers so offering their services shall be accepted by the President in companies, battalions, squadrons, regiments, brigades, or divisions, *whose officers shall be appointed in the manner prescribed by law in the several States and Territories to which such companies, battalions, squadrons, regiments, brigades, or divisions shall respectively belong.* (Act of February 6, 1812, sec. 1; act of May 23, 1806, sec. 3, and act of May 13, 1846, sec. 5.)

Also in the further provision—

> That where any company, battalion, squadron, regiment, brigade, or division of militia already organized shall tender their voluntary

> service to the United States, such company, battalion, squadron, regiment, brigade, or division shall continue to be commanded by officers holding commissions in the same at the time of such tender; and any vacancy thereafter occurring shall be filled in the mode pointed out by law in the State or Territory wherein the said company, battalion, squadron, regiment, brigade, or division shall have been originally raised. (Act of February 6, 1812, sec. 1; act of May 23, 1836, sec. 3.)

As to the first volunteer troops raised during the war of the rebellion, those called into the service by the President's proclamation of May 3, 1861, it was provided by War Department general orders that all company and field officers of volunteer regiments received into the service under said proclamation "should be appointed by the governors of the States furnishing the same." (See G. O., No. 15, A. G. O., 1861.)

Acts very similar to those discussed above were enacted by Congress in the first year of the civil war for the raising of volunteers for that war. Under the first of these, the act of July 22, 1861, it was provided that "the governors of States furnishing volunteers under this act shall commission the field, staff, and company officers requisite for the said volunteers" (Appendix 1, p. 79), and that when vacancies occurred in any of the volunteer organizations received into the service under said act they should be filled by election, and that "all officers so elected shall be commissioned by the respective governors of the States or by the

President of the United States." (Appendix 1, p. ~~10~~ 72) The concluding phrase "or by the President of the United States" was repealed by the act of August 16, 1861, which vested appointments of commissioned officers of the volunteers exclusively in the governors of the States furnishing the same. (Appendix 1, p. ~~12~~ 74) Under the second of the acts passed during the civil war, that of July 25, 1861, volunteers therein authorized were required to be organized as prescribed in the act of July 22, 1861, above discussed.

Commenting upon the constitutional origin and authority for the acts of Congress here in reference, Mr. William M. Whiting, Solicitor of the War Department, says: "They were mainly founded on the power to receive militia of the States into the service of the Union, and troops were raised principally through the agency of governors of States." (War Powers under the Constitution, p. 206.)

The character of the volunteer troops raised under this earlier legislation of the civil-war period as State troops finds further and explicit recognition in the following provisions of army regulations and general orders of the War Department of this period:

> The governors of States are legally the authorities for raising volunteer regiments and commissioning their officers. Accordingly, no independent organizations, as such, will be hereafter recognized in the United States service. Copies of the rolls of muster into the service will be sent as soon as practicable to the governors of the States to which they be-

long by the commanders of all brigades, regiments, or corps heretofore recognized as independent of State organizations; and all vacancies of commissions in such regiments and corps will be hereafter filled by the respective governors according to law. Wherever a regiment is composed of companies from different States, it will be considered as belonging to the State from which the greatest number of companies was furnished for that regiment. (G. O., No. 18, A. G. O., February 21, 1862.)

1. By direction of the Secretary of War, the following addition is made to paragraph 9, page 10, Revised Regulations for the Army:

Except commissions issued by the President to officers of volunteer regiments, which will be considered the same as if issued by the governors of States. (G. O., No. 23, A. G. O., March 3, 1862.)

2. Officers will be mustered into the service only on the authority of the governor of the State to which their regiments belong.

3. Until regiments are organized and their muster rolls completed, they will be under the exclusive control of the governors of the States, and all requisitions for quartermaster, medical, and ordnance stores and contracts for subsistence will, if approved by them, be allowed and not otherwise. (G. O., No. 75, A. G. O., July 8, 1862.)

The enrollment or draft act passed on March 3, 1863, and the acts amendatory thereto did not disturb in any essential regard, except in the manner of the recruiting,

the system of raising volunteer armies prescribed in the acts above discussed. Under these draft acts quotas were assigned, as before their enactment, to territorial subdivisions, and the recruits drafted in any particular State were either distributed among volunteer organizations already in the service from those States, or created into new organizations, which, like the old ones, were organized and officered by the State governors. The recruiting passed, by the provisions of the draft acts, more directly under the supervision and control of the General Government and particularly of the Provost-Marshal-General's Department; but even in this respect the cooperation of governors of States was invited and accepted. (Appendix 1, p. 83) In all other regards material to this discussion the preexisting system was not disturbed, and the troops raised under these later acts were just as much *State troops* as those raised in the earlier periods of the war.

The assimilation of the volunteer forces in service from 1806 to 1865 to the militia called into active service of the General Government during the same period is further revealed by comparing the special laws and regulations concerning these volunteers with the standing legislation under which the militia is called into active service (1 Stat., 272, 408, 424; 2 Stat., 1803; 12 Stat., 597). Making this comparison we find that the plan prescribed by law for raising volunteer armies was substantially the same as that prescribed for calling the militia into the service of the General Government. The number of volunteers to

be raised was either fixed in special legislation authorizing them (Appendix 1, p. 74, sec. 1), or left to the discretion of the President (Appendix 1, p. 76, sec. 1), as in the case of the militia (2 Stat., 424). Volunteers were to be apportioned among the several States and Territories on the basis of Federal population (Appendix 1, p. 74, sec. 1), and similarly the militia was apportioned (12 Stat., 597). The militia, when called into the service of the United States, was required to be organized in the mode prescribed by law for volunteers (12 Stat., 597). The President addressed requisitions to the governors of States to furnish their respective quotas of volunteers just as he did when the militia was called out, and these quotas of volunteers were organized and officered by the governors of the States, just as were organized and officered the corresponding quotas of militia forces. When mustered and accepted into the service these volunteer regiments, battalions, etc., like the corresponding militia organizations called into the service, took State designations, such as the First Missouri, Fifty-third Iowa, One hundred and third New York, and after being so mustered, as well as before, the necessary commissioned officers for both classes of troops were appointed by the respective State governors. It can not be doubted that as thus constituted these volunteer organizations were in *esprit de corps* and in all other material regards just as much State troops as were the militia organizations called into the service of the General Government.

The vesting by law of the appointment of officers of the volunteer forces in governors of States was of itself a recognition by Congress of the character of volunteers as State forces. Upon no other theory could the exercise of such power by governors of States be defended.

During the period here under discussion, 1806 to 1874, the Articles of War of 1806 were in force, and article 97 of this code regulated trials by courts-martial of troops other than regulars. If we are correct in our contention above, that the purpose and effect of said article 97 were to secure to State troops trials by their own officers, it is very clear that the volunteer armies of that period, which had clearly the character of State troops, fell within its provisions. We are not informed as to how the article of war was construed in respect of the volunteer armies of the war of 1812 and the Seminole and Mexican wars, as the precedents of that period are not well preserved. The act of February 6, 1812, under which the volunteers of the first of these wars were raised, was repealed by the act of January 29, 1813 (2 Stat., 794), which provided in their stead an increase in the Regular Army. The few volunteers which were in fact raised during this war—four regiments in all—were in the service for such a short period that it is doubtful if any occasion arose for applying the article to them. The practice seems not to have been uniform during the Mexican war, an examination of fifty court-martial cases selected at random from the files

of the War Department showing twelve of these cases tried by mixed courts of regular and volunteer officers and the remainder by courts-martial composed exclusively of volunteer officers. It is probably true that as a general rule the practice was to try volunteers by exclusively volunteer courts.

But that the ninety-seventh article of war was construed and applied to the volunteer armies of the civil war in the sense herein claimed is indicated in the following opinion rendered by Judge-Advocate-General Holt, on November 19, 1863, in which, reviewing previous opinions of his office for the civil war period, he says:

> The words "militia officers," as employed in the ninety-seventh article of war, have been interpreted since the commencement of the rebellion *as synonymous, as far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished.*

The provision of article 97 was that—

> Officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall at all times and in all places, when joined or acting in conjunction with regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces; *save only that such courts-martial shall be composed entirely of militia officers.*

Article 97 made no express mention of the class of troops known as volunteers, and, strictly construed, did not permit the trial of offenders of this branch by their own officers. Such trials were to be by *militia officers only.* This was clearly impracticable, if the two classes of troops were held to be separate and distinct forces, because of the very large number of volunteer troops and the relatively insignificant number of militia called into the service during that period. Administrative construction was resorted to to cure an obvious defect of the article, it being held that the words "militia officers" as employed in this article were synonymous with the words "volunteer officers;" that is, that the two classes of troops were one and the same force in the sense of an article of war which had to do with the enforcement of discipline through the agency of courts-martial. It is undoubtedly true that this construction was not in accord with the strict letter of the article, but was in accord with its spirit, for the reason, already demonstrated, that the volunteer armies of that period were directly assimilated to the militia in actual service, possessing with them the essential characteristics of State troops.

We are now prepared to consider the latest revision of the Articles of War, and legislation authorizing the use of volunteer troops enacted subsequently to their adoption, and to indicate the construction and application of said articles to these later volunteer armies.

FOURTH AMERICAN ARTICLES. CODE OF 1874.

The articles of 1806 were reenacted in modified form by section 2 of the act of June 20, 1874 (18

Stat., 113), and as reenacted constitute the existing military code, usually designated "The Articles of 1874." The provisions of the articles of 1806 above discussed appear in the revision of 1874 in the following form:

> ART. 64. The officers and soldiers of any troops, whether militia or others, mustered and in the pay of the United States, shall, at all times and in all places, be governed by the Articles of War, and shall be subject to trial by courts-martial.
>
> ART. 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article 78.

Article 78, referred to in the article last above quoted, relates to the Marine Corps, and has no bearing upon this case beyond the fact already noted, that its effect was to declare the Marine Corps to be within the designation "other forces" as employed in the seventy-seventh article, notwithstanding which they might, when detached for service with the Army by order of the President, be tried by officers of the Regurar Army.

(c) *The intent of the new articles, like that of the antecedent articles which they replaced, was to secure to troops contributed by the States trial by their own officers.*

The act of Congress which authorized the revision of 1874 provided in section 3 thereof that all laws in force on December 1, 1873, should be embraced in that revision. The seventy-seventh article of the

revised code, like its predecessors, makes no express mention of volunteers. The language employed, "other forces," is general and susceptible of different constructions. We are therefore entitled to consult the original legislation to ascertain its true meaning. The term "other forces," employed in the new article, evidently refers back to the words "any troops, whether militia or others, mustered and in pay of the United States," as employed in the preceding (sixty-fourth) article of war and in article 97 of the code of 1806; and this latter language is traceable to that of section 17, article 1, of the code of 1776, to wit: "The officers and soldiers of any troops, whether minute men, militia, or others, being mustered and in Continental pay." The history of this early legislation establishes conclusively, as we have shown, that its object was to prevent officers of the Federal Army sitting for the trial of officers or soldiers belonging to troops raised under the sovereignty of the States.

It is respectfully submitted that in view of the indefinite and general language in which the seventy-seventh article of war is expressed, and of the fact that it was required by law to be a reenactment of earlier legislation *in pari materia*, it should not be construed as having any broader scope or application than the antecedent articles which it replaced.

Two volunteer armies were authorized subsequent to the enactment of these articles. The first, the one for the war with Spain, was raised under the act of April 22, 1898, which act, and the administrative construc-

tion thereof by the War Department, is inserted as Appendix 2 of this brief. (p. 99) Its provisions are not material to this discussion.

The second volunteer army, the one raised for the Philippine insurrection, was authorized by the act of March 2, 1899, and was the army to which the petitioner belonged at the time of his trial, conviction, and sentence. It is contended by appellant that—

(*d*) *The effect of the act of Congress approved March 2, 1899, was to invest the Volunteer Army raised under its provisions with a character essentially different from that of the volunteer armies of previous wars, and to assimilate it to the Regular Army to the extent of taking it out of the designation "other forces" within the meaning of the seventy-seventh article of war.*

The provisions of the act of March 2, 1899, pertinent to the issues here under consideration are the following:

> 30 Stat., 977, Chap. 352: "An act for increasing the efficiency of the Army of the United States, and for other purposes."

The first eleven sections of this act relate exclusively to the Regular Army, defining its component parts and prescribing their organization.

> SEC. 12. That to meet the present exigencies of the military service the President is hereby authorized to maintain the Regular Army at a strength of not exceeding sixty-five thousand enlisted men, to be distributed amongst the several branches of the service, including the Signal Corps, according to the needs of each, and

raise a force of not more than thirty-five thousand volunteers to be recruited as he may determine from the country at large, or from the localities where their services are needed, without restriction as to citizenship or educational qualifications, and to organize the same into not more than twenty-seven regiments organized as are infantry regiments of war strength in the Regular Army, and three regiments to be composed of men of special qualifications in horsemanship and marksmanship, to be organized as cavalry for service mounted or dismounted: *Provided*, That each regiment shall have one surgeon with the rank of major; two assistant surgeons, one of whom shall have the rank of captain and one that of first lieutenant; and three hospital stewards: *Provided further*, That such increased regular and volunteer force shall continue in service only during the necessity therefor, and not later than July first, nineteen hundred and one.

All enlistments for the volunteer force herein authorized shall be for the term of two years and four months, unless sooner discharged.

SEC. 13. That the President shall have power to continue in service or to appoint, by and with the advice and consent of the Senate, brigadier-generals of volunteers, who, including the brigadier-generals of the Regular Army, shall not exceed one for every four thousand enlisted men actually in service, and major-generals of volunteers, who, including the major generals of the Regular Army, shall not exceed one for every twelve thousand enlisted men: *Provided*,

That Regular Army officers continued or appointed as general officers or as field or staff officers of volunteers under the provisions of this act shall not vacate their Regular Army commissions: *And provided further*, That no general officers appointed under the provisions of this section shall be continued in service as such beyond July first, nineteen hundred and one. * * *

SEC. 14. That the President is hereby authorized to continue in service, or to appoint, by and with the advice and consent of the Senate, officers of the volunteer staff as follows:

* * * Six commissaries of subsistence with the rank of major, and twelve commissaries of subsistence with the rank of captain. * * *

The foregoing act constitutes a marked departure from legislation theretofore resorted to by Congress for creating volunteer armies. It was the first legislation in our history where Congress, in authorizing a volunteer army, appealed directly to the people, *entirely* ignoring the agency of the States. This act of 1899 was to be administered wholly by United States officers, neither the governors nor other State authorities having any official functions to perform in relation to it. The power of appointment of officers was in no measure delegated. The recruiting was expressly required to be from the country at large, and those volunteering were not mustered in as State organizations, as in previous wars, but were required to be enlisted as individuals *and engaged directly with the United States to serve.*

In another regard highly material to this discussion the act of 1899 was different from prior acts authorizing volunteers. All these prior acts had, without exception, contained provisions expressly subjecting the volunteer troops authorized by them to the laws, orders, and regulations governing the Regular Army, and to trial by courts-martial. The act of 1899 contained no such provision. The court below, referring to a provision in the act of April 22, 1898, subjecting the volunteers to the laws, regulations, and orders pertaining to the regular service, held that the effect of such a provision was to demonstrate that the volunteers called out under that act were *other* forces than the Regular Army, arguing in that connection that if they were a part of the Regular Army "they were subject to the laws, orders, and regulations governing it without a special declaration to that effect." It will certainly be conceded that if the presence of such a provision in the act of 1898 demonstrates, as contended by the court, that the Volunteer Army to which it related was *other* forces than the regulars, then the absence of such a provision in the act of 1899 must be equally potent to prove that the volunteer troops it provided were *one* force with the regulars—at least not "other forces"—within the restricted meaning of the seventy-seventh article of war.

Twenty-five regiments in all were raised under this act, all of whose officers were appointed *by the President from the country at large.* The single cavalry regiment raised took the designation "Eleventh Regiment

of Cavalry, United States Volunteers," following and supplementing the ten regiments of cavalry in the regular service. The twenty-four regiments of infantry when organized received similar designations, to wit, "Twenty-sixth Regiment of Infantry, United States Volunteers," the Twenty-seventh, etc., supplementing the twenty-five regiments of infantry already in the regular service. The practice which this legislation permitted of giving regular officers commissions in the volunteers, a practice generally restricted by law when the power of appointment was vested in governors of States to one field officer to a regiment, obtained to a greater extent in the Volunteer Army of 1899 than in any previous one. Nearly all the field officers originally appointed for these twenty-five regiments—that is, all of the colonels, twenty-two of the twenty-five lieutenant-colonels, and more than 80 per cent of the majors—were regular officers, holding volunteer commissions. Quite a number of lieutenants of the Regular Army served in these volunteer regiments as captains, and the staff officers of this army included a large number of regular officers temporarily appointed as such under the authority of section 14 above quoted. (Official Register of Officers of Volunteers in the Service of the United States, June 1, 1901.) The presence of these regular officers helped to assimilate, to an extent not attained in any previous war, the volunteer regiments with which they were connected with the regiments in the regular service, and to conform them in their drill and discipline to Regular Army standards.

These volunteer regiments as thus created were relieved of every semblance of State troops which characterized the volunteers of previous wars, and became in every essential regard truly national. The brigading of volunteer and regular regiments together was the rule rather than the exception, as during the civil war, and the assimilation of the two classes of troops was complete. Whatever feeling of jealousy, distrust, or prejudice which may have existed between the earlier State volunteer and the regular, urged as a basis of the rule of disqualification of regular officers to sit on courts-martial for the trial of volunteers, was in this last Volunteer Army wholly eliminated.

The act of March 2, 1899, bears a very close resemblance to legislation resorted to in our earlier history to effect temporary increase in the Regular Army of the United States. Reference is here made to the act of February 11, 1847, under which the Regular Army was temporarily increased for the Mexican war by the addition of new regiments. The relevant provisions of this act are the following:

9 Stat., 123. Chap. 8. AN ACT to raise for a limited time an additional military force, and for other purposes.

SEC. 1. That, in addition to the present military establishment of the United States, there shall be raised and organized, under the direction of the President, *for and during the war with Mexico*, one regiment of dragoons and nine regiments of infantry, each to be composed of the same number and rank of commissioned or noncommissioned officers, buglers, musicians, and privates, etc., as are provided for a regi-

ment of dragroons and infantry, respectively, under existing laws, and who shall receive the same pay, rations, and allowances according to their respective grades, and be subject to the same regulations and to the Rules and Articles of War; * * *

SEC. 2. That, during the continuance of the war with Mexico, the term of enlistment for the men to be recruited for the regiment authorized by this act shall be during the war, unless sooner discharged.

* * * * *

SEC. 5. *That the said officers, musicians, and privates, authorized by this act, shall immediately be discharged from the service of the United States at the close of the war with Mexico.*

There never was any question but that the troops authorized by the foregoing act were additions to the Regular Army and subject, with the regulars, to the articles of war and to trial by court-martial thereunder.

The act is significant in that it shows that the Regular Army may embrace, besides the organizations in service for an indefinite period, others which are to remain in the service for a limited time only, and that limited tenure alone does not distinguish the volunteer from the regular. But it is primarily significant in the close analogy observable between its provisions and those of the act of March 2, 1899. The troops raised under it, like those raised under the latter act, were called into the service directly by the General Government, were required to be recruited and officered

by it from the country at large, were held to service for the period of the war, and were to be disbanded, officers and men, upon its termination. They thus did not differ in a single material regard from the volunteers raised under the act of 1899, unless it should be held that the mere retention of the name "volunteer" was such material difference.

Further examples of provisional forces closely analogous in their constitution and legislative sanction with the volunteers of 1899 are to be found in those special classes of troops authorized by the latest army reorganization act of February 2, 1901. Section 36 of this act provides that the President may, in his discretion, raise a force of natives of the Philippine Islands not exceeding 12,000, to be constituted by voluntary enlistment, to be organized as scouts, with such officers as he may deem necessary, or to have the organization of troops or companies as prescribed for the Regular Army; further authorizing such troops or companies to be combined into squadrons or battalions, with no higher organization, however, than such squadron or battalion. Officers of these special troops of the grades of major and captain were to be selected by the President from the next lower grades in the Regular Army, while first and second lieutenants might be selected from either noncommissioned officers or enlisted men of the regulars or volunteers then in service or who had served since April 22, 1898, or from natives of the islands showing fitness for command, within the discretion of the President, such appointments to be provisional and for periods of four years each.

Section 37 of this act similarly provided for a provisional volunteer regiment for Porto Rico, the enlisted strength to be composed, as far as practicable, of natives, the regiment to be organized as are infantry regiments of the Regular Army, its field officers to be selected from officers of the next lower grades of the Regular Army, all officers to be appointed by the President, and the regiment to be continued in service until further directed by Congress.

The points of analogy of these special troops to the volunteer troops of 1899 are to be found (1) in the fact that both classes of troops were authorized by acts of Congress, the primary purpose of which was to effect a reorganization of the Regular Army; (2) both were made up exclusively of volunteers, and officered in the higher grades by regulars and in the subordinate grades by appointments by the President, and (3) both were, in fair contemplation of the statutes under which they were organized, in their nature emergency forces.

It is the contention of this brief that these special troops, like the volunteers of 1899, are one force with the regulars within the restricted sense of the seventy-seventh article of war; but it must be conceded that they are other forces than the regulars in certain respects; that there are many differences other than those noted above between them and regulars—differences as to tactical organization, pay and allowances prescribed or permitted by the act creating them, and differences in the matter of special administration and

regulation necessitated by the character of these troops and the nature of the service required of them—must be conceded. Under the construction of the seventy-seventh article of war, announced by the court below, it is open to question whether these troops must not be regarded as "other forces" than the regulars, and entitled to exemption under that article from trial by officers of the Regular Army. It would be clearly impracticable to extend them such exemption, for the reason that they are not assembled in larger tactical units than battalions and squadrons, and further because the nature of the duty assigned them—scouting duty—requires them to be split up into much smaller organizations than battalions or squadrons and widely scattered. There would ordinarily be too few of them in any one place to make it possible to convene a court of their own officers for the trial of offenders, and reliance must necessarily be had upon officers of organizations of the Regular Army with which they are, in small detachments, associated. In practice, this is what has been done and must continue to be done in the event these troops are retained in the service; but the legality of such practice, under the ruling of the court below, is open to serious question.

The court below reached the conclusion that the volunteers of 1899 were, under the seventy-seventh article of war, exempt from trial by regular officers, by rejecting the view herein advanced, that the purpose of that article was to exempt troops raised under the sovereignty of the States from trial by officers of the Federal Army, and holding that its intent was to secure to

the volunteers *trial by their peers.* The court, in so construing the seventy-seventh article of war and in discussing the reason which led to its enactment, in part says:

> It is grounded in that cardinal principle of the Anglo-Saxon jurisprudence that no man shall be tried or condemned save by the hearing and judgment of his peers; in that principle which inspired the rule that deprives judges of the power to try persons accused of heinous crimes in civil life and remits their trial to the forum of their peers—the jury.

This is believed to be the first expression ever made by a court of the view that a military accused was entitled to be tried by his peers, and is thought to be clearly erroneous. Trial by peers, although a cardinal principle of the common law, was never a principle of the common-law military of England or of its military statute law, which made the administration of military punishment an exception to the rule that "no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within the realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm."

The character of military service necessitates many and serious departures in the matter of trials of military offenders from principles of common law. The Constitution recognizes this fact in the exception which it provides of "cases arising in the land or naval forces, or in the militia, when in actual service in time of war

or public danger," under the terms of which a military accused is not entitled, *of right*, to the privileges and safeguards extended by the amendments to persons accused of civil crimes (4 Wall., 142). It is recognized by the statute law in the denial to a military accused of the right of peremptory challenge (art. 88), and of the right to be confronted in noncapital cases, whatever may be their gravity, by witnesses against him, or to have compulsory process for obtaining witnesses in his favor (art. 91). In many other respects the articles of war and the regulations made by the President to carry them into effect are inconsistent with the provisions of the amendments of the Constitution and deprive officers and soldiers, in their military status, of rights guaranteed to citizens by the Constitution. The extension of such rights to a military accused would, in the language of an English author, be repugnant to the spirit of martial law and to the administration of military justice, which demands, above all other considerations, prompt trials and prompt punishments.

It is respectfully submitted that the court below, in construing the American articles as requiring military offenders to be tried by their peers, has ignored the construction supported by the history of these articles and engrafted on our military code a deduction from the civil practice antagonistic to the principles upon which military law is founded, and wholly foreign to military codes, either ancient or modern.

There remains to be noticed the contention of counsel for petitioner that the colored troops employed

during the civil war were, like the Volunteer Army of 1899, raised directly by the General Government, and that such troops were held exempt from trial by regular officers. Counsel might have instanced further the "Veteran Reserve Corps" and the "Veteran Volunteers" as having a status similar to the United States colored troops; but his further statement that the colored troops were identical in status with the volunteers of 1899, and that under the law they could not be tried by officers of the Regular Army, is misleading and inaccurate.

That this court may be fully advised of the character possessed by the organizations above noted, there are inserted, as Appendix 3 to this brief, the Executive orders under which the Veteran Reserve Corps and the Veteran Volunteers were organized, with a reference to the statute authorizing the raising of colored troops.

An examination of these orders shows that the Veteran Reserve Corps, at first designated the Invalid Corps, was organized under General Orders, No. 5, of the War Department, April 28, 1863, and General Orders, No. 111, March 18, 1864, and that it was composed of officers and enlisted men present with or absent from their commands and unfit for active field service on account of wounds or disease contracted in the line of duty but still fit for garrison service; in smaller measure of officers and enlisted men honorably discharged on account of wounds or disease contracted in the line of duty and who desired to reenter the service for light duty. It was thus mainly constituted by

transfer to it of officers and men who had originally entered the service as members of State organizations.

The Veteran Volunteers organized under War Department General Orders No. 191, June 25, 1863, were made up of men enlisted in the several States, who were permitted, at their option, to enter old regiments then in service. Officers of regiments, whose terms had expired, were authorized, *upon proper application and approval of their respective governors*, to raise companies and regiments of this class of troops, the officers to be recommissioned of the date of their original commissions, or to have their commissions continued so as to preserve their date of rank as fixed by their original muster into the United States service. It is expressly provided in paragraph 11 of the order creating this force that—

> Volunteers enlisted under this order will be credited as three years' men in the quotas of their respective States. *Instructions for the appointment of recruiting officers and for enlisting veteran volunteers will be immediately issued to the governors of States.*

The United States Colored Troops were organized under section 24 of the act of February 24, 1864 (Appendix 1, p. 87), which required the enrollment of all able-bodied male colored persons between the ages of 20 and 45 years resident in the United States. It further provided that men of color drafted, enlisted, or who may volunteer into the military service under its provisions should not be assigned as State troops but should be mustered into regiments or companies as

United States Colored Troops; but that they should be credited on the quotas of the several States or subdivisions of States wherein they were respectively drafted, enlisted, or had volunteered.

It is thus seen that these special classes of troops were not identical in status with the volunteers of 1899, but, on the contrary, were allied in many material regards with the State volunteers of that period, and constituted, as between the latter and the former, an intermediate force.

On December 16, 1864, the Judge-Advocate-General rendered an opinion on the subject of the constitution of courts-martial for the trial of officers and soldiers in the Veteran Reserve Corps and United States colored troops, in language as follows:

> In the absence of any statute law which either designates officers of the Veteran Reserve Corps or of the United States colored troops as regulars in express terms, or by a necessary implication from its provisions fixes upon them this status, the Secretary of War has not proceeded to so characterize them, and until he shall do so these officers should, so far as the composition of courts-martial is concerned, be regarded as a part of the volunteer force.

This is very far from being a ruling that these special troops had the legal status of volunteers raised by the States. The actual language of the opinion is strongly suggestive of the view that the Secretary of War might, under the laws and orders of the War Department under which these troops were organized,

have characterized them as having the status of regulars; that not having done so, "and until he should do so these officers should, so far as the composition of courts-martial is concerned, be regarded as a part of the volunteer force." The opinion appears thus to have turned rather upon the declared policy of the Government to accord a relatively small number of volunteer troops, raised directly by it during this period, the same privileges as were accorded to the larger number raised by the States, than upon the imperative requirement of the statute.

In the general view advanced in this brief these special troops might have been tried by either regular or volunteer officers, and the decisions to try them exclusively by the latter was based wholly upon policy and not upon legal necessity.

SECOND PROPOSITION.

That even if the petitioner were to be treated as an officer of "other forces" within the meaning of said article 77, that fact would not deprive the court-martial of regular officers which tried him of jurisdiction; this article relates entirely to the competency of members of a court-martial, not at all to its jurisdiction.

Article 77 contains no reference to the *jurisdiction* of a court-martial. It merely provides that certain officers "shall not be *competent* to sit on courts-martial to try" certain offenders. The jurisdiction of the court-martial, i. e., its power to hear and determine, is regulated entirely by other articles; as to offenses by articles 3, 5 to 9, inclusive, 13 to 28, inclusive, 30 to 62,

inclusive, and 65; as to persons by section 1342, Revised Statutes, and notably by articles 45, 46, 63, and 64 thereunder.

But article 77 does not purport to designate either the persons within the jurisdiction of courts-martial or the offenses for which they may be tried, its sole purpose being to place a limitation upon the qualification or competency of the members of such a tribunal, or to establish a statutory ground of challenge.

All the officers composing the court-martial which tried the petitioner were officers in the Regular Army. Upon arraignment before it he expressly stated that he had no objection to being tried by any member thereof. If it be held that the petitioner was an officer of other forces within the meaning of the seventy-seventh article, then all the members of the court were incompetent to try him under that article. Are their findings and sentence for this reason absolutely null and void, as contended by petitioner?

This question must be answered in the light of civil precedents, no case in point having arisen in the practice of courts-martial. There are two classes of these precedents—those relating to the verdict of incompetent jurors and those relating to the acts and judgments of disqualified judges. Before these precedents can be intelligently applied to the question here under discussion it must first be determined whether the analogy of the court-martial is to the civil jury or to the judge.

(*a*) *The analogy of the court-martial is to the jury.*

The Hon. Caleb Cushing, Attorney-General, in an

opinion rendered in 1853, held that this analogy was complete. His language is, in part, as follows:

> The power of the Secretary of War or Navy, or other lawful authority, to send back a case to the court-martial for revisal is called a singularity in jurisprudence. On the other hand, its apparent singularity, as we have seen, arises from not duly regarding the nature of a court-martial and its relation to the approving power. Until the sentence of a court-martial has been approved or disapproved the case still remains *sub judice*. In fact, the analogy of a court-martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of the judge in the latter. The judge remands the case to the jury for further consideration. The verdict must be accepted by the judge and judgment rendered accordingly before the verdict can have its complete execution and effect, whether of conviction or acquittal. So, in the corresponding case, it must be with the proceedings of a court-martial as respects the approving power.
>
> The opposite impression has been derived from erroneous estimation of the fact that a court-martial graduates punishment in addition to finding the verdict of guilty. So may a jury. There is nothing in the nature of the institution of a jury to forbid its measuring the sentence as well as judging of the question of guilt or innocence. By the time-honored practice of the common law the jury measures the damages in all cases of unliquidated demand between party and party. Why not the same

> in criminal affairs? In fact it does so by the law of Virginia (Code of Virginia, ch. 199, secs. 23, 24) and of some other States of the Union. Thus the analogy is complete between a jury and a court-martial (6 Op., 206).

The analogy here claimed of the court-martial to the jury finds abundant support in the views of military law writers. Colonel Winthrop, in his recent and authoritative work on military law, discussing the history and nature of courts-martial, says:

> Not a part of the judiciary, but an agency of the executive department. Courts-martial of the United States, although their legal sanction is no less than that of the Federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the judiciary of the United States, and are not thus included among the "inferior" courts which Congress "may from time to time ordain and establish." * * *
>
> Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are, in fact, simply *instrumentalities of the Executive power*, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.
>
> Thus, indeed, strictly, a court-martial is not a *court* in the full sense of the term, or as the same is understood in the civil phraseology. It has no common-law powers whatever, but only

such powers as are vested in it by express statute, or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the "courts of the United States" have any application to it; nor is it embraced in the provisions of the sixth amendment to the Constitution. *It is, indeed, a creature of orders, and, except in so far as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person.*

A temporary summary tribunal, not a court of record. As a purely executive agency designated for military uses, called into existence by military order and by a similar order dissolved when its purpose is accomplished, the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action. It is not, in a legal sense, a "court of record," and, unlike the superior courts of record, has no fixed place of session, no permanent office or clerk, no seal, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, *and its judgment is simply a recommendation, not operative till approved by a revisory commander.*" * * * (Winthrop's Military Law and Precedents, vol. 1, pp. 53–55.) [Italics supplied.]

Indeed, in its taking of a statutory oath, its being subject to challenge, its hearing and weighing of evidence, its finding of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. (Id., pp. 62–63.)

To the same effect is Davis on Military Law, page 15, where, in discussing the authority and functions of courts-martial, he says:

> Their sentences, however, have no legal validity, being in the nature of recommendations merely until they have received the approval of a military commander designated by law for this purpose, called the *reviewing authority*. With such approval or confirmation, however, their sentences become operative and acquire the same sanction as the sentences of civil courts having criminal jurisdiction and are entitled to the same legal consideration.
>
> Courts-martial * * * are creatures of *orders*, the power to convene them, as well as the power to act upon their proceedings, being an attribute of *command*.

Colonel Winthrop, after setting forth, as above, the analogies which the court-martial sustains to the traverse jury, indicates the following aspects in which a court-martial may be said to be assimilated to the judge rather than the jury: (1) In its arraignment of the accused; (2) its entertaining of special pleas to its jurisdiction or competency as a court; (3) and of objections to the sufficiency of the pleadings and the admission of testimony, (4) its authority to grant continuances and to adjourn, and (5) its power to impose a sentence. But that the analogy to the judge here indicated is more apparent than real is conclusively shown by the same author, who, in his further comment upon the exercise of these attributes by courts-

martial, and speaking of pleas to the jurisdiction or competency, says:

> A court-martial is authorized to pass upon the question of its own authority to proceed to *try* under the convening order. *Its conclusion, indeed, upon such question is in the nature of a recommendation and not final; and if, having determined that it has not jurisdiction, it is thereupon ordered by the convening officer to take cognizance of the case, it will be its duty to comply.* As we have already seen, a court-martial is a creature of orders, and, except as to the exercise of an authority specifically devolved by statute, is subject to the orders of the proper superior equally as is any officer or body of officers in the Army. (Italics supplied.)

Further, in discussing objections to the sufficiency of the pleadings (charges and specifications), the same authority says:

> This motion (motion to quash) being of a summary and aggressive character, in the nature of a raid upon the indictment, it is agreed by the authorities that it is in all cases wholly *within the discretion of the court* whether or not it will allow a proceeding the effect of which is to eliminate the entire basis and material of the prosecution or an important part of it. * * * But if the motion is specifically granted, and it relates to the only charge or all the charges in the case, the court will communicate, through its president, to the convening authority the action taken and await his orders. * * * The commander, on receiving the report of the

> court, may, if he disapproves its action, *order it positively to proceed to try the charges, or require it to reconsider such action in the same manner as upon a final judgment.* [Italics supplied.] (Id., pp. 373, 378.)

We have already seen, in the opinion of the Attorney-General cited *supra*, that the power to impose a sentence which a court-martial possesses is one possessed by both jury and judge, and does not, therefore, establish any analogy to the latter. In its arraignment of an accused and its power to adjourn, a court-martial is controlled by orders of the convening authority; so that in all material regards cited above, in which a court-martial may be said to be assimilated to the judge, it is shown that such court decides under a direct accountability to the reviewing authority, who must be associated with the court-martial before any real analogy between it and a civil court is found. In the *Esmond case* (5 Mackey, 70) the supreme court of the District of Columbia supports the general view here contended for, saying:

> The effect and conclusiveness of any action of the court stands as much upon the reviewing officer's approval and order as upon the original proceedings and sentence of the court. The two constitute an entire proceeding and are to be considered together.

That the findings and sentence of a court-martial are lifeless and of no effect whatever until vitalized by the approval of the reviewing authority, and that they constitute a simple recommendation addressed to the

discretion of the latter, whose action thereon is absolutely essential in order to give them force and effect, is fully substantiated above. The similarity of such sentence to the verdict of a jury, which must likewise be converted into a judgment by the approval of the judge, is apparent, and the analogy of the court-martial to the jury would, as stated by Attorney-General Cushing, seem to be complete.

(*b*) *The verdict of a jury composed of incompetent persons, or a sentence of a court-martial likewise constituted, is voidable only, and if incompetency is not made the subject of timely objection, absolutely valid.*

In *Clark* v. *Van Vracken* (20 Barb., 281) it was held that:

> A challenge to a juror does not go to the jurisdiction of the tribunal; though a juror may be incompetent as such, the trial is not invalidated.

The authorities are uniform in supporting the doctrine announced in this case.

The military authorities recognize and apply the same doctrine as to trials by courts-martial. Winthrop, in discussing this precise question of the competency of members of courts-martial, and speaking of the terms "incompetent" and "disqualified," says:

> It must not be inferred from this use that it is intended that the juror or member is, by reason of liability to challenge, disqualified to act on the court, *or that his acting thereon impairs the legality of the proceedings.* (Winthrop's Military Law and Precedents, vol. 1, p. 344.)

In the Federal courts the doctrine that verdicts of juries are, for incompetency, voidable only and absolutely valid if the incompetency is not made the subject of timely objection is firmly established. In an early case (*Hollingsworth* v. *Duane*, Wallace C. C., 147) a defendant sought to have a verdict set aside because of the alienage of one of the jurors, of which fact he was ignorant prior to the verdict; but the court, although conceding that the ground was one which would have afforded a right of challenge had it been exercised in time, held that it was waived when not raised until after verdict. This ruling was approved by the Supreme Court in 4 Dallas (U. S.), 353.

This early precedent was followed and extended in *Kohl* v. *Lehlback* (160 U. S., 293), where the petitioner for a writ of *habeas corpus* had been convicted of murder by a jury, one of whose members was an alien, which fact constituted an express ground of challenge under the State statute. The Supreme Court held, not only that the right of challenge for this cause was one which could be waived, even where the accused was ignorant thereof at the time, but also that, after trial, the fact of incompetency could not be made a ground for *habeas corpus*. The court say (p. 302):

> The disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if, voluntarily, or through negligence, or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as

affecting the substantial rights of the accused, and the verdict is not void for want of power to render it.

So where the jurors are required to be residents of the county or district, the fact that one or more of them is incompetent in this regard is not even a ground for a new trial if raised for the first time after verdict. (*Queen* v. *Hepburn*, 3 Cranch (U. S.), 290; *Fisher* v. *Yoder*, 53 Fed. Rep., 565.) Much less can it be a ground of attack in a collateral proceeding like *habeas corpus*.

The disqualification alleged in the case at bar, if it existed at all, was like that in *Kohl* v. *Lehlback* (*supra*), a "cause of challenge *propter defectum*," i. e., on account of personal incompetency. It is not a ground of challenge *propter affectum*, such as relationship or interest in the cause. (See Winthrop's Military Law, p. 294.)

The latter is a much more serious ground of challenge, and the courts are correspondingly less inclined, on grounds of public policy, to treat the right of challenge as waived. Yet, even in such cases, and even where the ground of disqualification exists on the part of the judge instead of one of the jurors, it has been held to be waived if not raised until after trial.

In Arkansas the constitution prohibited a judge from presiding in a cause where either of the parties was related to him. In *Pettigrew* v. *Washington Co.* (43 Ark., 33) one of the parties was a son of the judge, and it was there contended, as here, that the

judgment was void for want of jurisdiction. But the court held that as the objection was not raised before trial it had been waived.

The same ruling was applied in *Fowler* v. *Brooks*, (64 N. H., 423), where the justice of the peace who rendered the judgment was related to one of the parties.

In Tennessee the statute prohibits a judge from sitting in any cause where he is related to either of the parties, unless all of the latter consent in writing. It has been repeatedly held, however, that this provision is waived if not raised before trial and that where a judge, though related to one or more of the parties, renders a judgment after a trial, without objection, such judgment can not be collaterally assailed. (*Crozier* v. *Goodwin*, 1 Lea (Tenn.), 123; *Holmes* v. *Eason*, 8 Lea (Tenn.), 754. See, also, as announcing the same doctrine, *Wilson* v. *Smith*, 38 S. W. Rep. (Ky.), 870).

But it is not necessary in the case at bar to claim the full benefit of these latter decisions as to the acts of disqualified judges. The analogy of the court-martial is not to the judge, but to the jury. The fact that the finding of a court-martial "is simply a recommendation, not operative until approved by a revisory commander" (Winthrop's Military Law, p. 53), is in itself sufficient to make such finding more like a verdict than a judgment and the tribunal more like a jury than a court. And the right of challenge which applies to both jury and court-martial is everywhere subject to the same limitations; it must be exercised

before trial by the party in whose favor it exists or it will be waived.

In the case at bar there is no pretense that the petitioner exercised the right of challenge. The record shows an express waiver by him of any objection to the members who composed the court-martial, and there could not have been on his part the unavailing excuse of ignorance. Officer that he himself was, he must have known from what branch of the service the officers were drawn who composed the court-martial. As was said in *Hollingsworth* v. *Duane* (Wallace, C. C., 161), "This surely can not be pretended a secret or extraordinary cause of challenge."

From every standpoint, therefore, of precedent, principle, and natural justice, the petitioner, if he ever had any ground of objection to the competency of the members of the court-martial, has waived it, and he is now in no position to assail its proceedings.

THIRD PROPOSITION.

The court-martial having jurisdiction and acting within its powers, its proceedings can not be assailed by habeas corpus.

Whether the members of the court-martial that tried the petition were officers of "other forces" or not, whether its members were in all respects competent or incompetent, the fact remains that the court-martial had jurisdiction of the accused and of the offense, and there is no claim that it exceeded the powers of a court-martial. This being true, its proceedings will not be reviewed on *habeas corpus*. (Am. and Eng. Ency. of Law, Habeas Corpus, vol. 15, p. 176.)

Judgments of courts-martial: A court-martial is a special tribunal with jurisdiction of a particular class of cases. If such a court has no jurisdiction over the subject-matter of the charge which it has been convened to try, or inflicts a punishment forbidden by law, though its sentence be approved by the reviewing officers, the civil courts may, on habeas corpus, inquire into the question of jurisdiction and discharge the prisoner. To warrant a discharge, however, the sentence must be absolutely void, and not merely erroneous and voidable. Where courts-martial have jurisdiction their proceedings can not be collaterally impeached on habeas corpus for any mere error or irregularity committed within the sphere of their authority.

Custody under judgment of court-martial, United States.

Ex parte Miligan, 4 Wall. (U. S.), 2.

Ex parte Reed, 100 U. S., 13.

Ex parte Mason, 105 U. S., 696.

As is said by Mr. Justice Gray in *Johnson* v. *Sayer* (158 U. S., 109):

> The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts, by writs of *habeas corpus* or otherwise.

To the same effect is *Ex parte Reed* (100 U. S., 13), in which the court says:

> A writ of *habeas corpus* can not be made to perform the functions of a writ of error. To

warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void.

No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law. (*Tyler* v. *Pomeroy*, 8 Allen, 484.)

In *Rose ex rel. Carter* v. *Roberts* (99 Fed. Rep., 948) the court said:

> It is not the office of a writ of *habeas corpus* to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by Congress, in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ, as it may be when the judgment of any tribunal is attacked, but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine and to render the particular judgment and sentence imposed; but if this exists, however erroneous the proceedings may be, they can not be reviewed collaterally, or redressed by *habeas corpus*. These principles have been repeatedly declared by the authorities. *In re Davidson* (C. C.), 21

Fed., 618; *Ex parte Reed*, 100 U. S., 13, 25 L. ed., 538; *In re Coy*, 127 U. S., 731, 8 Sup. Ct., 1263, 32 L. ed., 274; *Ex parte Yarbrough*, 110 U. S., 651, 4 Sup. Ct., 152, 28 L. ed., 274; *United States* v. *Prifgeon*, 153 U. S., 59, 14 Sup. Ct., 746, 38 L. ed., 631.

JOHN K. RICHARDS,
Solicitor-General.

E. H. CROWDER,
Lieutenant-Colonel and Judge-Advocate.

APRIL 17, 1902.

APPENDIX I.

WAR OF 1812.

2 Stat., 676. Approved February 6, 1812. Chapter 21.

AN ACT authorizing the President of the United States to accept and organize certain volunteer military corps.

That the President of the United States be, and he hereby is, authorized to accept of any company or companies of volunteers, either of artillery, cavalry, or infantry, who may associate and offer themselves for the service, not exceeding thirty thousand men, who shall be clothed and furnished with horses at their own expense, and armed and equipped at the expense of the United States after they shall be called into service, except such of them as may choose to furnish their own arms, and whose commissioned officers shall be appointed in the manner prescribed by law in the several States and Territories to which such companies shall respectively belong: *Provided*, That where any company, battalion, regiment, brigade, or division of militia already organized shall tender their voluntary service to the United States, such company, battalion, brigade, or division shall continue to be commanded by the officers holding commissions in the same at the time of such tender, and any vacancy thereafter occurring shall be filled in the mode pointed out by law in the State or Territory wherein the said company, battalion, regiment, brigade, or division shall have been originally raised.

SEC. 2. That any company, battalion, regiment, brigade, or division thus offering itself for the service shall be liable to be called upon to do military duty at any time the President of the United States shall judge proper, within two years after he shall accept the same, and shall be bound to continue in service for the term of twelve months after they shall have arrived at the place of rendezvous, unless sooner discharged; and when called into actual service, and whilst remaining therein, shall be under the same rules and regulations, and be entitled to the same pay, rations, forage, and emoluments of every kind, bounty and clothing excepted, with the regular troops of the United States: *Provided*, That, in lieu of clothing, every noncommissioned officer and private, in any company, who may offer themselves, shall be entitled when called into actual service, to receive in money a sum equal to the cost of the clothing of a noncommissioned officer or private (as the case may be) in the regular troops of the United States.

SEC. 3. That the President of the United States be, and he hereby is, authorized to organize the companies so tendering their service, as aforesaid, into battalions, squadrons, regiments, brigades, and divisions, as soon as the number of volunteers shall render such organization, in his judgment, expedient; but, until called into actual service, such companies shall be bound to do regular militia duty as is required by law, in like manner as before the passage of this act.

SEC. 8. That the sum of $1,000,000 be appropriated to defray the expenses which may be incurred under the provisions of this act, to be paid out of any money in the Treasury not otherwise appropriated.

2 Stat., 785. Approved July 6, 1812. Chapter 138.

AN ACT Supplementary to the act entitled "An act authorizing the President of the United States to accept and organize certain volunteer military corps."

That in all cases where volunteers have offered or hereafter shall offer their services to the United States, under the act entitled "An act authorizing the President of the United States to accept and organize certain volunteer military corps," it shall be lawful for the President of the United States to appoint and commission officers thereto, by and with the advice and consent of the Senate, anything in the said act to the contrary notwithstanding: *Provided*, That, prior to the issuing of such commissions, the volunteers aforesaid shall have signed an enrolment binding themselves to service, conformably to the provisions of the act to which this is a supplement.

SEC. 2. That the President be, and he is hereby, authorized to form the corps of volunteers into battalions, squadrons, regiments, brigades, and divisions, and to appoint thereto, by and with the advice and consent of the Senate, general, field, and staff officers, conformably with the military establishment of the United States, and who shall be entitled to the pay and emoluments of officers of a similar grade and corps in the Army of the United States.

SEC. 3. That it shall be lawful for the President of the United States, in the recess of the Senate, to appoint all the officers authorized by this act, which appointments shall be submitted to the Senate, at their next session, for their advice and consent.

2 Stat., 794. Approved January 29, 1813. Chapter 16.

AN ACT in addition to the act entitled "An act to raise an additional military force," and for other purposes.

That, in addition to the present military establishment of the United States, there be raised such number of regiments of infantry, not exceeding twenty, as, in the opinion of the President, may be necessary for the public service, to be enlisted for the term of one year, unless sooner discharged.

SEC. 18. That the act entitled "An act authorizing the President of the United States to accept and organize certain volunteer military corps," and the act entitled "An act supplementary to the act entitled 'An act authorizing the President of the United States to accept and organize certain volunteer military corps,'" be, and the same are hereby, repealed, from and after the 1st day of February next: *Provided*, That nothing herein contained shall be so construed as to deprive the officers and men who may have entered the service as volunteers, under the said acts, of any rights, immunities, or privileges therein secured, or the United States of the services of such volunteers, agreeably to the provisions of said acts.

SEMINOLE WAR.

5 Stat., 32. Approved May 23, 1836. Chapter 80.

AN ACT authorizing the President of the United States to accept the service of volunteers, and to raise an additional regiment of dragoons or mounted riflemen.

Be it enacted, etc., That the President of the United States be, and he hereby is, authorized to accept volunteers who may offer their services either as infantry or cavalry, not exceeding ten thousand men, to serve six to twelve months after they shall have arrived at

the place of rendezvous, unless sooner discharged; and the said volunteers shall furnish their own clothes, and, if cavalry, their own horses, and when mustered into service shall be armed and equipped at the expense of the United States.

SEC. 2. That the said volunteers shall be liable to be called upon to do military duty only in cases of Indian hostilities, or to repel invasions, whenever the President shall judge proper, and when called into actual service, and while remaining therein, shall be subject to the rules and articles of war, and shall be in all respects, except as to clothing, placed on the same footing with similar corps of the United States Army; and in lieu of clothing, every non-commissioned officer and private, in any company, who may thus offer themselves, shall be entitled, when called into actual service, to receive in money a sum equal to the cost of the clothing of a non-commissioned officer or private (as the case may be) in the regular troops of the United States.

SEC. 3. That the said volunteers so offering their services shall be accepted by the President in companies, battalions, squadrons, regiments, brigades, or divisions, whose officers shall be appointed in the manner prescribed by law in the several States and Territories to which such companies, battalions, squadrons, regiments, brigades, or divisions shall respectively belong: *Provided*, That where any company, battalion, squadron, regiment, brigade, or division, of militia already organized, shall tender their voluntary service to the United States, such company, battalion, squadron, regiment, brigade, or division shall continue to be commanded by the officers holding commissions in the same at the time of such tender; and any vacancy

thereafter occurring shall be filled in the mode pointed out by law in the State or Territory wherein the said company, battalion, squadron, regiment, brigade, or division shall have been originally raised.

SEC. 4. That the President of the United States be, and he is hereby, authorized to organize companies so tendering their services into battalions or squadrons, battalions or squadrons into regiments, regiments into brigades, and brigades into divisions, as soon as the number of volunteers shall render such organization in his judgment expedient; and the President shall, if necessary, apportion the staff, field, and general officers among the respective States or Territories from which the volunteers shall tender their services, as he may deem proper, but until called into actual service such companies, battalions, squadrons, regiments, brigades, or divisions shall not be considered as exempt from the performance of militia duty as required by law, in like manner as before the passage of this act.

SEC. 7. * * * and that the sum of $300,000, required to carry into effect the provisions of this act, is hereby appropriated out of any money in the Treasury not otherwise appropriated.

SEC. 8. That so much of this act as relates to volunteers shall be in force for two years from and after the passage of this act and no longer.

WAR WITH MEXICO.

9 Stat., 9. Approved May 13, 1846. Chap. 16.

AN ACT providing for the prosecution of the existing war between the United States and the Republic of Mexico.

That, for the purpose of enabling the Government of the United States to prosecute said war to a speedy and successful termination, the President be, and he is

hereby, authorized to employ the militia, naval, and military forces of the United States and to call for and accept the services of any number of volunteers, not exceeding 50,000, who may offer their services either as cavalry, artillery, infantry, or riflemen, to serve twelve months after they shall have arrived at the place of rendezvous, or to the end of the war, unless sooner discharged, according to the time for which they shall have been mustered into service; and that the sum of $10,000,000, out of any moneys in the Treasury, or to come into the Treasury, not otherwise appropriated, be, and the same is hereby, appropriated for the purpose of carrying the provisions of this act into effect.

SEC. 3. That the said volunteers shall furnish their own clothes, and, if cavalry, their own horses and horse equipments, and when mustered into service shall be armed at the expense of the United States.

SEC. 4. That said volunteers shall, when called into actual service and while remaining therein, be subject to the rules and articles of war, and shall be in all respects, except as to clothing and pay, placed on the same footing with similar corps of the United States Army; and in lieu of clothing every noncommissioned officer and private in any company who may thus offer himself shall be entitled, when called into actual service, to receive in money a sum equal to the cost of clothing of a noncommissioned officer or private (as the case may be) in the regular troops of the United States.

SEC. 5. That the said volunteers so offering their services shall be accepted by the President in companies, battalions, squadrons, and regiments, whose officers shall be appointed in the manner prescribed by

law in the several States and Territories to which such companies, battalions, squadrons, and regiments shall respectively belong.

SEC. 6. That the President of the United States be, and he is hereby, authorized to organize companies so tendering their services into battalions or squadrons, battalions and squadrons into regiments, regiments into brigades, and brigades into divisions, as soon as the number of volunteers shall render such organization, in his judgment, expedient; and the President shall, if necessary, apportion the staff, field, and general officers among the respective States and Territories from which the volunteers shall tender their services, as he may deem proper.

SEC. 9. That whenever the militia or volunteers are called and received into the service of the United States, under the provisions of this act, they shall have the organization of the Army of the United States, and shall have the same pay and allowances; and all mounted privates, noncommissioned officers, musicians, and artificers shall be allowed 40 cents per day for the use and risk of their horses, except of horses actually killed in action; and if any mounted volunteer, private, noncommissioned officer, musician, or artificer shall not keep himself provided with a serviceable horse, the said volunteer shall serve on foot.

WAR OF THE REBELLION.

12 Stat., 1260. Promulgated May 3, 1861.

Whereas existing exigencies demand immediate and adequate measures for the protection of the national Constitution and the preservation of the national Union by the suppression of the insurrectionary combinations

now existing in several States for opposing the laws of the Union and obstructing the execution thereof, to which end a military force in addition to that called forth by my proclamation of the fifteenth day of April, in the present year, appears to be indispensably necessary:

Now, therefore, I, Abraham Lincoln, President of the United States, and Commander in Chief of the Army and Navy thereof, and of the militia of the several States when called into actual service, do hereby call into the service of the United States forty-two thousand and thirty-four volunteers, to serve for the period of three years unless sooner discharged, and to be mustered into service as infantry and cavalry. The proportions of each arm and the details of enrollment and organization will be made known through the Department of War.

* * * * *

The call for volunteers, hereby made, and the direction for the increase of the Regular Army, and for the enlistment of seamen hereby given, together with the plan of organization adopted for the volunteers and for the regular forces hereby authorized, will be submitted to Congress as soon as assembled.

In the meantime I earnestly invoke the cooperation of all good citizens in the measures hereby adopted, for the effectual suppression of unlawful violence, for the impartial enforcement of constitutional laws, and for the speediest possible restoration of peace and order, and, with these, of happiness and prosperity throughout the country.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this third day of May, in the year of our Lord one thousand eight

hundred and sixty-one, and of the Independence of the United States the eighty-fifth.

[L. S.] ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

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12 Stat., 268. Approved July 22, 1861. Chapter 19.

AN ACT to authorize the employment of volunteers to aid in enforcing the laws and protecting public property.

Whereas certain of the forts, arsenals, custom-houses, navy-yards, and other property of the United States have been seized, and other violations of law have been committed and are threatened by organized bodies of men in several of the States, and a conspiracy has been entered into to overthrow the Government of the United States: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to accept the services of volunteers, either as cavalry, infantry, or artillery, in such numbers, not exceeding five hundred thousand, as he may deem necessary, for the purpose of repelling invasion, suppressing insurrection, enforcing the laws, and preserving and protecting the public property: *Provided,* That the services of the volunteers shall be for such time as the President may direct, not exceeding three years nor less than six months, and they shall be disbanded at the end of the war. And all provisions of law applicable to three years' volunteers shall apply to two years' volunteers, and to all volunteers who have been, or may be, accepted into the service of the United States, for a period not less than six months, in the same manner as

if such volunteers were specially named. Before receiving into service any number of volunteers exceeding those now called for and accepted, the President shall, from time to time, issue his proclamation, stating the number desired, either as cavalry, infantry, or artillery, and the States from which they are to be furnished, having reference, in any such requisition, to the number then in service from the several States, and to the exigencies of the service at the time, and equalizing, as far as practicable, the number furnished by the several States, according to Federal population.

SEC. 2. *And be it further enacted*, That the said volunteers shall be subject to the rules and regulations governing the Army of the United States, and that they shall be formed, by the President, into regiments of infantry, with the exception of such numbers for cavalry and artillery, as he may direct, not to exceed the proportion of one company of each of those arms to every regiment of infantry, and to be organized as in the regular service. * * *

SEC. 4. * * * The governors of the States furnishing volunteers under this act shall commission the field, staff, and company officers requisite for the said volunteers; but, in cases where the State authorities refuse or omit to furnish volunteers at the call or on the proclamation of the President, and volunteers from such States offer their services under such call or proclamation, the President shall have power to accept such services, and to commission the proper field, staff, and company officers.

SEC. 10. *And be it further enacted*, That the general commanding a separate department or a detached army is hereby authorized to appoint a military board or commission, of not less than three nor more than five

officers, whose duty it shall be to examine the capacity, qualifications, propriety of conduct, and efficiency of any commissioned officer of volunteers within his department or army who may be reported to the board or commission; and upon such report, if adverse to such officer, and if approved by the President of the United States, the commission of such officer shall be vacated: *Provided always*, That no officer shall be eligible to sit on such board or commission whose rank or promotion would in any way be affected by its proceedings, and two members, at least, if practicable, shall be of equal rank of the officer being examined; and when vacancies occur in any of the companies of volunteers an election shall be called by the colonel of the regiment to fill such vacancies, and the men of each company shall vote in their respective companies for all officers as high as captain, and vacancies above captain shall be filled by the votes of the commissioned officers of the regiment, and all officers so elected shall be commissioned by the respective governors of the States, or by the President of the United States.

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12 Stat., 274. Approved July 25, 1861. Chapter 17.

AN ACT in addition to the "Act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," approved July twenty-second, eighteen hundred and sixty-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to accept the services of volunteers, either as cavalry, infantry, or artillery, in such numbers as the exigencies of the public service may in his opinion demand, to be organized as authorized by the act of the twenty-second of July, eighteen hundred and

sixty-one: *Provided*, That the number of troops hereby authorized shall not exceed five hundred thousand.

SEC. 2. *And be it further enacted*, That the volunteers authorized by this act shall be armed as the President may direct; they shall be subject to the Rules and Articles of War, and shall be upon the same footing in all respects with similar corps of the United States Army, and shall be mustered into the service for "during the war."

SEC. 3. *And be it further enacted*, That the President shall be authorized to appoint, by and with the advice and consent of the Senate, for the command of the volunteer forces, such number of major-generals and of brigadier-generals as may, in his judgment, be required for their organization.

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12 Stat., 284. Approved July 31, 1861. Chapter 34.

AN ACT authorizing the Secretary of War to reimburse volunteers for expenses incurred in employing regimental and other bands, and for other purposes.

SEC. 2. *And be it further enacted*, That the President, in accepting and organizing volunteers under the act entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," approved July twenty-two, eighteen hundred and sixty-one, may accept the service of such volunteers without previous proclamation, and in such numbers from any State or States as, in his discretion, the public service may require.

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12 Stat., 317. Approved August 6, 1861. Chapter 57.

AN ACT To promote the efficiency of the Engineer and Topographical Engineer Corps, and for other purposes.

SEC. 3. *And be it further enacted*, That vacancies hereafter occurring among the commissioned officers

of the volunteer regiments shall be filled by the governors of the States respectively in the same manner as original appointments. And so much of the tenth section of the act approved July twenty-second, eighteen hundred and sixty-one, as is inconsistent herewith be, and the same is hereby, repealed.

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12 Stat., 326. Approved August 6, 1861. Chapter 63.

AN ACT To increase the pay of the privates in the Regular Army and in the volunteers in the service of the United States, and for other purposes.

SEC. 3. *And be it further enacted*, That all the acts, proclamations, and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the Army and Navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.

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12 Stat., 731. Approved March 3, 1863. Chapter 75.

AN ACT for enrolling and calling out the national forces, and for other purposes.

Whereas there now exist in the United States an insurrection and rebellion against the authority thereof, and it is, under the Constitution of the United States, the duty of the Government to suppress insurrection and rebellion, to guarantee to each State a republican form of government, and to preserve the public tranquillity; and whereas for these high purposes a military force is indispensable, to raise and support which

all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government; therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.

SEC. 3. *And be it further enacted*, That the national forces of the United States not now in the military service, enrolled under this act, shall be divided into two classes, the first of which shall comprise all persons subject to do military duty between the ages of twenty and thirty-five years, and all unmarried persons subject to do military duty above the age of thirty-five and under the age of forty-five; the second class shall comprise all other persons subject to do military duty; and they shall not, in any district, be called into the service of the United States until those of the first class shall have been called.

SEC. 4. *And be it further enacted*, That for greater convenience in enrolling, calling out, and organizing the national forces, and for the arrest of deserters and spies of the enemy, the United States shall be divided into districts, of which the District of Columbia shall constitute one, each Territory of the United States

shall constitute one or more, as the President shall direct, and each Congressional district of the respective States, as fixed by a law of the State next preceding the enrollment, shall constitute one: *Provided*, That in States which have not by their laws been divided into two or more Congressional districts, the President of the United States shall divide the same into so many enrollment districts as he may deem fit and convenient.

SEC. 5. *And be it further enacted*, That for each of said districts there shall be appointed by the President a provost-marshal, with the rank, pay, and emoluments of a captain of cavalry, or an officer of said rank shall be detailed by the President, who shall be under the direction and subject to the orders of a provost-marshal-general, appointed or detailed by the President of the United States, whose office shall be at the seat of government, forming a separate bureau of the War Department, and whose rank, pay, and emoluments shall be those of a colonel of cavalry.

SEC. 8. *And be it further enacted*, That in each of said districts there shall be a board of enrolment, to be composed of the provost-marshal, as president, and two other persons, to be appointed by the President of the United States, one of whom shall be a licensed and practicing physician and surgeon.

SEC. 9. *And be it further enacted*, That it shall be the duty of the said board to divide the district into subdistricts of convenient size, if they shall deem it necessary, not exceeding two, without the direction of the Secretary of War, and to appoint, on or before the tenth day of March next, and in each alternate year thereafter, an enrolling officer for each subdistrict, and to furnish him with proper blanks and instructions; and he shall immediately proceed to enroll all persons

subject to military duty, noting their respective places of residence, ages on the first day of July following, and their occupation, and shall, on or before the first day of April, report the same to the board of enrolment, to be consolidated into one list, a copy of which shall be transmitted to the provost-marshal-general on or before the first day of May succeeding the enrolment: *Provided, nevertheless*, That if from any cause the duties prescribed by this section can not be performed within the time specified, then the same shall be performed as soon thereafter as practicable.

SEC. 10. *And be it further enacted*, That the enrolment of each class shall be made separately, and shall only embrace those whose ages shall be, on the first day of July thereafter, between twenty and forty-five years.

SEC. 11. *And be it further enacted*, That all persons thus enrolled shall be subject, for two years after the first day of July succeeding the enrolment, to be called into the military service of the United States, and to continue in service during the present rebellion, not, however, exceeding the term of three years; and when called into service shall be placed on the same footing, in all respects, as volunteers for three years, or during the war, including advance pay and bounty as now provided by law.

SEC. 12. *And be it further enacted*, That whenever it may be necessary to call out the national forces for military service, the President is hereby authorized to assign to each district the number of men to be furnished by said district; and thereupon the enrolling board shall, under the direction of the President, make a draft of the required number. * * * In assigning to the districts the number of men to be furnished

therefrom, the President shall take into consideration the number of volunteers and militia furnished by and from the several States in which said districts are situated, and the period of their service since the commencement of the present rebellion, and shall so make said assignment as to equalize the numbers among the districts of the several States, considering and allowing for the numbers already furnished as aforesaid and the time of their service.

SEC. 33. *And be it further enacted*, That the President of the United States is hereby authorized and empowered, during the present rebellion, to call forth the national forces, by draft, in the manner provided for in this act.

SEC. 34. *And be it further enacted*, That all persons drafted under the provisions of this act shall be assigned by the President to military duty in such corps, regiments, or other branches of the service as the exigencies of the service may require.

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13 Stat., 6. Approved February 24, 1864. Chapter 13

AN ACT to amend an act entitled "An act for enrolling and calling out the national forces, and for other purposes," approved March third, eighteen hundred and sixty-three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States shall be authorized, whenever he shall deem it necessary, during the present war, to call for such number of men for the military service of the United States as the public exigencies may require.

SEC. 2. *And be it further enacted*, That the quota of each ward of a city, town, township, precinct, or election district, or of a county, where the county is not

divided into wards, towns, townships, precincts, or election districts, shall be, as nearly as possible, in proportion to the number of men resident therein liable to render military service, taking into account, as far as practicable, the number which has been previously furnished therefrom; and in ascertaining and filling said quota there shall be taken into account the number of men who have heretofore entered the naval service of the United States, and whose names are borne upon the enrollment lists as already returned to the office of the provost-marshal-general of the United States.

SEC. 3. *And be it further enacted*, That if the quotas shall not be filled within the time designated by the President, the provost-marshal of the district within which any ward of a city, town, township, precinct, or election district, or county, where the same is not divided into wards, towns, townships, precincts, or election districts, which is deficient in its quota, is situated, shall, under the direction of the provost-marshal-general, make a draft for the number deficient therefrom; but all volunteers who may enlist after the draft shall have been ordered, and before it shall be actually made, shall be deducted from the number ordered to be drafted in such ward, town, township, precinct, or election district, or county. And if the quota of any district shall not be filled by the draft made in accordance with the provisions of this act, and the act to which it is an amendment, further drafts shall be made, and like proceedings had, until the quota of such district shall be filled.

SEC. 4. *And be it further enacted*, That any person enrolled under the provisions of the act for enrolling and calling out the national forces, and for other purposes, approved March third, eighteen hundred and sixty-three, or who may be hereafter so enrolled, may

furnish, at any time previous to the draft, an acceptable substitute, who is not liable to draft, nor at the time in the military or naval service of the United States, and such person so furnishing a substitute shall be exempt from draft during the time for which (such) substitute shall not be liable to draft, not exceeding the time for which such substitute shall have been accepted.

SEC. 6. *And be it further enacted*, That boards of enrolment shall enroll all persons liable to draft under the provisions of this act and the act to which this is an amendment whose names may have been omitted by the proper enrolling officers; all persons who shall arrive at the age of twenty years before the draft; all aliens who shall declare their intentions to become citizens; all persons discharged from the military or naval service of the United States who have not been in such service two years during the present war; and all persons who have been exempted under the provisions of the second section of the act to which this is an amendment, but who are not exempted by the provisions of this act; and said boards of enrolment shall release and discharge from draft all persons who, between the time of enrolment and the draft, shall have arrived at the age of forty-five years, and shall strike the names of such persons from the enrolment.

SEC. 11. *And be it further enacted*, That section third of the "act for enrolling and calling out the national forces, and for other purposes," approved March third, eighteen hundred and sixty-three, and so much of section ten of said act as provides for the separate enrolment of each class, be, and the same are hereby, repealed; and it shall be the duty of the board of enrolment of each district to consolidate the two classes mentioned in the third section of said act.

SEC. 24. *And be it further enacted*, That all able-bodied male colored persons, between the ages of twenty and forty-five years, resident in the United States, shall be enrolled according to the provisions of this act, and of the act to which this is an amendment, and form part of the national forces; and when a slave of a loyal master shall be drafted and mustered into the service of the United States, his master shall have a certificate thereof, and thereupon such slave shall be free; and the bounty of one hundred dollars, now payable by law for each drafted man, shall be paid to the person to whom such drafted person was owing service or labor at the time of his muster into the service of the United States. The Secretary of War shall appoint a commission in each of the slave States represented in Congress, charged to award to each loyal person to whom a colored volunteer may owe service a just compensation, not exceeding three hundred dollars, for each such colored volunteer, payable out of the fund derived from commutations, and every such colored volunteer on being mustered into the service shall be free. And in all cases where men of color have been heretofore enlisted or have volunteered in the military service of the United States, all the provisions of this act, so far as the payment of bounty and compensation are provided, shall be equally applicable as to those who may be hereafter recruited. But men of color, drafted or enlisted, or who may volunteer into the military service, while they shall be credited on the quotas of the several States, or subdivisions of States, wherein they are respectively drafted, enlisted, or shall volunteer, shall not be assigned as State troops, but shall be mustered into regiments or companies as United States colored troops.

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SEC. 27. *And be it further enacted*, That so much of the act entitled "An act for enrolling and calling out the national forces, and for other purposes," approved March third, eighteen hundred and sixty-three, as may be inconsistent with the provisions of this act, is hereby repealed.

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13 Stat., 80. Approved May 20, 1864. Chapter 92.

AN ACT to organize a regiment of Veteran Volunteer Engineers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized to enlist, out of any volunteer forces in the army of the Cumberland that have served or are now serving as pioneers, pontoniers, or engineers, to serve wherever required for three years, or during the war, to consist of ten companies, and to have the same organization, pay, and emoluments as are allowed to engineer soldiers under the provisions of the fourth section of an act entitled "An act providing for the better organization of the military establishment," approved August third, eighteen hundred and sixty-one.

SEC. 2. *And be it further enacted*, That the officers of the engineers authorized to be raised under the provisions of the foregoing section shall be appointed and commissioned by the President of the United States, on the recommendation of the commander of the army of the Cumberland, and shall receive the same pay and allowances as engineer officers of similar grade in the regular army.

13 Stat., 379. Approved July 4, 1864. Chapter 237.

AN ACT further to regulate and provide for the enrolling and calling out the national forces, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States may, at his discretion, at any time hereafter call for any number of men as volunteers for the respective terms of one, two, and three years for military service; and any such volunteer, or, in case of draft, as hereinafter provided, any substitute, shall be credited to the town, township, ward of a city, precinct, or election district, or of a county not so subdivided, toward the quota of which he may have volunteered or engaged as a substitute; * * *

SEC. 2. *And be it further enacted*, That in case the quota, or any part thereof, of any town, township, ward of a city, precinct, or election district, or of any county not so subdivided, shall not be filled within the space of fifty days after such call, then the President shall immediately order a draft for one year to fill such quota, or any part thereof, which may be unfilled; and in case of any such draft no payment of money shall be accepted or received by the Government as commutation to release any enrolled or drafted man from personal obligation to perform military service.

SEC. 3. *And be it further enacted*, That it shall be lawful for the executive of any of the States to send recruiting agents into any of the States declared to be in rebellion, except the States of Arkansas, Tennessee, and Louisiana, to recruit volunteers under any call under the provisions of this act, who shall be credited to the State, and to the respective subdivisions thereof, which may procure the enlistment.

SEC. 4. *And be it further enacted*, That drafted men, substitutes, and volunteers, when mustered in, shall be organized in, or assigned to, regiments, batteries, or other organizations of their own States, and, as far as practicable, shall, when assigned, be permitted to select their own regiments, batteries, or other organizations from among those of their respective States which at the time of assignment may not be filled to their maximum number.

SEC. 6. *And be it further enacted*, That section three of an act entitled "An act to amend an act entitled 'An act for enrolling and calling out the national forces, and for other purposes,'" approved February twenty-four, eighteen hundred and sixty-four, be, and the same is hereby, amended, so as to authorize and direct district provost-marshals, under the direction of the provost-marshal-general, to make a draft for one hundred per centum in addition to the number required to fill the quota of any district as provided by said section.

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13 Stat., 487. Approved March 3, 1865. Chapter 79.

AN ACT to amend the several acts heretofore passed to provide for the enrolling and calling out the national forces, and for other purposes.

SEC. 6. *And be it further enacted*, That the President is hereby authorized to enlist or organize, out of troops already in the service, six regiments of volunteer engineers, to be organized in accordance with existing laws, to have the same pay and allowances of engineer troops of the Regular Army, and to be subjected to the rules and articles of war.

SEC. 7. *And be it further enacted*, That the President is hereby authorized to enlist two additional companies to be added to the regiment of volunteer engineers

raised under the provisions of an act approved May twentieth, eighteen hundred and sixty-four, entitled "An act to organize a regiment of veteran volunteers," and said regiment shall be considered one of the regiments authorized in the preceding section of this act.

SEC. 13. *And be it further enacted*, That where any revised enrolment in any Congressional or draft district has been obtained or made prior to any actual drawing of names from the enrolment lists, the quota of such district may be adjusted and apportioned to such revised enrolment instead of being applied to or based upon the enrolment as it may have stood before the revision.

SEC. 14. *And be it further enacted*, That hereafter all persons mustered in (to) the military or naval service, whether as volunteers, substitutes, representatives, or otherwise, shall be credited to the State and to the ward, township, precinct, or other enrolment subdistrict where such persons belong by actual residence (if such persons have an actual residence within the United States), and where such persons were or shall be enrolled (if liable to enrolment). * * * *Provided*, That in any call for troops hereafter no county, town, township, ward, precinct, or election district shall have credit except for men actually furnished on said call or the preceding call by said county, town, township, ward, precinct, or election district, and mustered into the military or naval service on the quota thereof.

SEC. 15. *And be it further enacted*, That in computing quotas hereafter credit shall be given to the several States, districts, and subdistricts for all men furnished from them, respectively, and not heretofore credited, during the present rebellion, for any period of service of not less than three months, calculating the number

of days for which such service was furnished, and reducing the same to years: *Provided*, That such credits shall not be applied to the call for additional troops made by the President on the twenty-first day of December, eighteen hundred and sixty-four.

SEC. 22. *And be it further enacted*, That the third section of the act entitled "An act (further) to regulate and provide for the enrolling and calling out the national forces, and for other purposes," approved July fourth, eighteen hundred and sixty-four, be, and the same is hereby, repealed.

SEC 27. *And be it further enacted*, That this act shall take effect from and after its passage: *Provided*, That nothing herein contained shall operate to postpone the pending draft or interfere with the quotas assigned therefor.

CALLS FOR TROOPS AND ASSIGNMENT OF STATE QUOTAS.

Calls for troops were made during the civil war period under the proclamation of May 3, 1861, for 42,034 men for three years, and under the acts of July 22 and 25, 1861, for 500,000 men for one, two, and three years, and under the draft acts by proclamations of October 17, 1863, and February 1, March 14, July 18, and December 19, 1864, for an aggregate of 1,500,000 men for service for one, two, and three years. A single proclamation, with assignment of State quotas thereunder, will illustrate the administrative methods pursued.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Whereas by the act approved July 4, 1864, entitled "An act further to regulate and provide for the enroll-

ing and calling out the national forces, and for other purposes," it is provided that the President of the United States may, "at his discretion, at any time hereafter, call for any number of men as volunteers, for the respective terms of one, two, and three years, for military services," and "that in case the quota of (or) any part thereof, of any town, township, ward of a city, precinct, or election district, or of a county not so subdivided, shall not be filled within the space of fifty days after such call, then the President shall immediately order a draft for one year to fill such quota, or any part thereof, which may be unfilled;"

And whereas the new enrollment heretofore ordered is so far completed as that the aforementioned act of Congress may now be put in operation for recruiting and keeping up the strength of the armies in the field, for garrisons, and such military operations as may be required for the purpose of suppressing the rebellion and restoring the authority of the United States Government in the insurgent States:

Now, therefore, I, Abraham Lincoln, President of the United States, do issue this my call for 500,000 volunteers for the military service; provided, nevertheless, that this call shall be reduced by all credits which may be established under section eight of the aforesaid act, on account of persons who have entered the naval service during the present rebellion, and by credits for men furnished to the military service in excess of calls heretofore made.

Volunteers will be accepted under this call for one, two, or three years, as they may elect, and will be entitled to the bounty provided by the law for the period of service for which they enlist.

And I hereby proclaim, order, and direct that, immediately after the fifth day of September, 1864,

being fifty days from the date of this call, a draft for troops to serve for one year shall be had in every town, township, ward of a city, precinct, or election district, or county not so subdivided, to fill the quota which shall be assigned to it under this call, or any part thereof which may be unfilled by volunteers on the said fifth day of September, 1864.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

[L. S.] ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD,
Secretary of State.

The quotas under this call were as follows:

Maine	11,690	District of Columbia	2,910
New Hampshire	6,502	Kentucky	23,503
Vermont	5,156	Ohio	50,792
Massachusetts	21,670	Indiana	35,732
Rhode Island	3,197	Illinois	52,057
Connecticut	10,121	Missouri	26,678
New York	89,318	Michigan	18,282
New Jersey	15,891	Iowa	15,784
Pennsylvania	61,700	Wisconsin	19,032
Delaware	2,445	Minnesota	5,561
Maryland	12,328	Kansas	3,725
West Virginia	5,928		

The following Army regulation and general orders of the War Department, supplementary to the legislation above set forth, illustrate still further the charac-

teristics of the volunteer armies raised under said acts as State troops:

General Orders, No. 18. } HEADQUARTERS OF THE ARMY, ADJUTANT-GENERAL'S OFFICE, *Washington, February 21, 1862.*

The following orders have been received from the War Department:

1. The governors of States are legally the authorities for raising volunteer regiments and commissioning their officers. Accordingly, no independent organizations, as such, will be hereafter recognized in the United States service. Copies of the rolls of muster into service will be sent as soon as practicable to the governors of the States to which they belong by the commanders of all brigades, regiments, or corps heretofore recognized as independent of State organizations; and all vacancies of commissions in such regiments and corps will be hereafter filled by the respective governors according to law. Wherever a regiment is composed of companies from different States, it will be considered as belonging to the State from which the greatest number of companies was furnished for that regiment.

* * * * *

By command of Major-General McClellan.

L. THOMAS, *Adjutant-General.*

General Orders, No. 23. } HEADQUARTERS OF THE ARMY, ADJUTANT-GENERAL'S OFFICE, *Washington, March 3, 1862.*

* * * * *

2. By direction of the Secretary of War the following addition is made to paragraph 9, page 10, Revised

Regulations for the Army: Except commissions issued by the President to officers of volunteer regiments, which will be considered the same as if issued by the governors of States.

* * * * *

By command of Major-General McClellan:

L. THOMAS,
Adjutant General.

General Orders, No. 75. } HEADQUARTERS OF THE ARMY, ADJUTANT-GENERAL'S OFFICE, *Washington, July 8, 1862.*

1. In organizing new regiments of volunteers the governors of States are hereby authorized to appoint, in addition to the staff officers heretofore authorized, one second lieutenant for each company, who shall be mustered into the service at the commencement of the organization, who shall have authority to muster in recruits as they are enlisted. * * *

2. Officers will be mustered into the service only on the authority of the governor of the State to which their regiments belong.

3. Until regiments are organized and their muster rolls completed they will be under the exclusive control of the governors of the States, and all requisitions for quartermaster, medical, and ordnance stores, and contracts for subsistence, will, if approved by them, be allowed, and not otherwise.

4. Where it is desired by the governors of States, the United States officers of the Quartermaster, Medical, and Ordnance departments may turn over stores to the State authorities, to be issued by them in accordance with the regulations, and accounted for to the proper bureau of the War Department.

5. Persons travelling under the order of the governor of a State on business connected with the recruiting service will be allowed the actual cost of transportation, to be paid by the mustering and disbursing officer on presentation of the account, accompanied by proper vouchers and the order under which the journey was performed.

By order of the Secretary of War:

L. THOMAS,
Adjutant-General.

APPENDIX 2.

SPANISH WAR.

30 Stat., 361. Approved April 22, 1898. Chapter 187.

AN ACT to provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States.

SEC. 2. That the organized and active land forces of the United States shall consist of the Army of the United States and of the militia of the several States when called into the service of the United States: *Provided*, That in time of war the Army shall consist of two branches, which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States.

SEC. 3. That the Regular Army is the permanent military establishment, which is maintained both in peace and war according to law.

SEC. 4. That the Volunteer Army shall be maintained only during the existence of war, or while war

is imminent, and shall be raised and organized, as in this act provided, only after Congress has or shall have authorized the President to raise such a force or to call into the actual service of the United States the militia of the several States: *Provided*, That all enlistments for the Volunteer Army shall be for a term of two years, unless sooner terminated, and that all officers and men composing said army shall be discharged from the service of the United States when the purposes for which they were called into service shall have been accomplished, or on the conclusion of hostilities.

SEC. 5. That when it becomes necessary to raise a volunteer army the President shall issue his proclamation stating the number of men desired, within such limits as may be fixed by law, and the Secretary of War shall prescribe such rules and regulations, not inconsistent with the terms of this act, as may in his judgment be necessary for the purpose of examining, organizing, and receiving into service the men called for: *Provided*, That all men received into service in the Volunteer Army shall, as far as practicable, be taken from the several States and Territories and the District of Columbia and the Indian Territory in proportion to their population. And any company, troop, battalion, or regiment from the Indian Territory shall be formed and organized under such rules and regulations as shall be prescribed by the Secretary of War.

SEC. 6. That the Volunteer Army and the militia of the States when called into the service of the United States shall be organized under, and shall be subject to, the laws, orders, and regulations governing the Regular Army: *Provided*, That each regiment of the Volunteer Army shall have one surgeon, two assistant surgeons, and one chaplain, and that all the regimental

and company officers shall be appointed by the governors of the States in which their respective organizations are raised: *Provided further*, That when the members of any company, troop, battery, battalion, or regiment of the organized militia of any State shall enlist in the Volunteer Army in a body, as such company, troop, battery, battalion, or regiment, the regimental, company, troop, battery, and battalion officers in service with the militia organization thus enlisting may be appointed by the governors of the States and Territories, and shall, when so appointed, be officers of corresponding grades in the same organization when it shall have been received into the service of the United States as a part of the Volunteer Army: *Provided further*, That the President may authorize the Secretary of War to organize companies, troops, battalions, or regiments, possessing special qualifications, from the nation at large, not to exceed three thousand men, under such rules and regulations, including the appointment of the officers thereof, as may be prescribed by the Secretary of War.

SEC. 7. That all organizations of the Volunteer Army shall be so recruited from time to time as to maintain them as near to their maximum strength as the President may deem necessary, and no new organization shall be accepted into service from any State unless the organizations already in service from such State are as near to their maximum strength of officers and enlisted men as the President may deem necessary.

SEC. 8. That all returns and muster rolls of organizations of the Volunteer Army and of militia organizations while in the service of the United States shall be rendered to the Adjutant-General of the Army, and upon the disbandment of such organizations the records

pertaining to them shall be transferred to and filed in the Record and Pension Office of the War Department. And regimental and all other medical officers serving with volunteer troops in the field or elsewhere shall keep a daily record of all soldiers reported sick or wounded, as shown by the morning calls or reports, and shall deposit such reports, with other reports provided for in this section, with the Record and Pension Office, as provided herein for other reports, returns, and muster rolls.

SEC. 9. That in time of war, or when war is imminent, the troops in the service of the United States, whether belonging to the Regular or Volunteer Army or to the militia, shall be organized, as far as practicable, into divisons of three brigades, each brigade to be composed of three or more regiments; and whenever three or more divisions are assembled in the same army the President is authorized to organize them into army corps, each corps to consist of not more than three divisions.

SEC. 10. That the staff of the commander of an army corps shall consist of one assistant adjutant-general, one chief engineer, one inspector-general, one chief quartermaster, one chief commissary of subsistence, one judge-advocate, and one chief surgeon, who shall have, respectively, the rank of lieutenant-colonel; one assistant adjutant-general, who shall have the rank of captain, and the aids-de-camp authorized by law. The staff of the commander of a division shall consist of one assistant-adjutant-general, one engineer officer, one inspector-general, one chief quartermaster, one chief commissary of subsistance, and one chief surgeon, who shall have, respectively, the rank of major, and the aids-de-camp authorized by law. The

staff of the commander of a brigade shall consist of one assistant adjutant-general, one assistant quartermaster, and one commissary of subsistence, each with the rank of captain, one surgeon, and the aids-de-camp authorized by law. The staff officers herein authorized for the corps, division, and brigade commanders may be appointed by the President, by and with the advice and consent of the Senate, as officers of the Volunteer Army, or may be assigned by him, in his discretion, from officers of the Regular Army or the Volunteer Army, or of the militia in the service of the United States: *Provided*, That when relieved from such staff service, said appointments or assignments shall terminate.

SEC. 11. That the President is hereby authorized to appoint in the Volunteer Army, by and with the advice and consent of the Senate, not exceeding one major-general for each organized army corps and division, and one brigadier-general for each brigade, and any officer so selected and appointed from the Regular Army shall be entitled to retain his rank therein: *Provided*, That each general officer of the Volunteer Army shall be entitled to the number of aids-de-camp authorized for an officer of like grade in the Regular Army.

SEC. 12. That all officers and enlisted men of the Volunteer Army, and of the militia of the States when in the service of the United States, shall be in all respects on the same footing as to pay, allowances, and pensions as that of officers and enlisted men of corresponding grades in the Regular Army.

SEC. 13. That the governor of any State or Territory may, with the consent of the President, appoint officers of the Regular Army in the grades of field

officers in organizations of the Volunteer Army, and officers thus appointed shall be entitled to retain their rank in the Regular Army: *Provided*, That not more than one officer of the Regular Army shall hold a commission in any one regiment of the Volunteer Army at the same time.

SEC. 14. That the general commanding a separate department or a detached army is authorized to appoint from time to time military boards of not less than three nor more than five volunteer officers of the Volunteer Army to examine into the capacity, qualifications, conduct, and efficiency of any commissioned officer of said army within his command: *Provided*, That each member of the board shall be superior in rank to the officer whose qualifications are to be inquired into: *And provided further*, That if the report of such a board is adverse to the continuance of any officer, and the report be approved by the President, such officer shall be discharged from service in the Volunteer Army, at the discretion of the President, with one month's pay and allowances.

SEC. 15. That all acts and parts of acts inconsistent with the provisions hereof be, and the same are hereby, repealed.

WAR DEPARTMENT,
OFFICE OF THE JUDGE-ADVOCATE-GENERAL,
Washington, June 27, 1898.

To the ADJUTANT-GENERAL.

SIR: My attention has been called to paragraph 2 of Special Orders, No. 52, Headquarters Department of the Gulf, declaring the proceedings of a court-martial in the case of Private James A. Scott, South Carolina Volunteer Artillery, illegal and the sentence null and

void, for the reason that a Regular Army officer was a member of the court.

I have recently had occasion to express my views to a different effect, and copy my remarks here:

"I suppose this is referred to me for an expression of my views as to whether, under existing laws, general courts-martial can be composed of both regulars and volunteers for the trial of either regulars or volunteers.

"The seventy-seventh article of war prescribes that 'officers of the Regular Army shall not be competent to sit on courts-martials to try officers or soldiers of other forces, except as provided in article 78.' Article 78 relates to the Regular Army and the Marines serving together. It would thus seem that the Marines would come under the head of 'other forces'—in regard to whom, however, an exception is made.

It was also held by this office that the volunteers of the war of the rebellion were 'other forces,' within the meaning of article 77.[a]

"By the act temporarily increasing the military establishment, approved April 22, 1898, it is provided that in time of war the Army shall consist of two branches, which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States; that the Regular Army is the permanent military establishment, which is maintained both in peace and war, and that the Volunteer Army shall be maintained only during the existence of war or while war is imminent.

"The question is whether this Volunteer Army comes under the head of 'other forces,' as the term is used in

[a] This statement is erroneous. Article 77 was not enacted until 1874, nine years after the close of the war of the rebellion. There could not, therefore, have been any such ruling.

the seventy-seventh article. It might, perhaps, be held either way without a stretch of construction. The Regular Army and the Volunteer Army are made 'branches' of the same Army, and yet one is a permanent and the other a temporary force; so that they are in one respect of the same forces and in another respect of different forces; but I am of the opinion that, under the language of the present legislation, the restriction does not apply. The present Volunteer Army is an entirely different system from that of the war of the rebellion, and what was held in regard to the latter in this respect would not seem now to apply; nor does it seem to come within the original reason for the legislation which was to secure the State troops trial by their own officers. I am not, indeed, convinced of the correctness of the ruling that the Volunteer Army of the war of the rebellion was within the meaning of 'other forces.'"

If these views should be concurred in, I respectfully suggest that it be announced in decision circular that as the act "to provide for temporarily increasing the military establishment in the United States in time of war," approved April 22, 1898, declares that the Army of the United States, in time of war, shall consist of both the Regular Army and the Volunteer Army, it can not be held that the Volunteer Army is, with reference to the Regular Army, "other forces," within the meaning of the seventy-seventh article of war, but that regular officers may now sit on courts-martial for the trial of volunteer officers or soldiers.

Very respectfully,

G. NORMAN LIEBER,
Judge-Advocate-General.

Circular, No 21.

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, June 30, 1898.

1. The following decision has been made and is published to the Army for the information of all concerned:

Detail of officers of the Regular Army on courts-martial for the trial of volunteers: As the act "to provide for the temporarily increasing the military establishment of the United States in time of war," approved April 22, 1898, declares that the Army of the United States, in time of war, shall consist of both the Regular Army and the Volunteer Army, it can not be held that the Volunteer Army is, with reference to the Regular Army, "other forces," within the meaning of the seventy-seventh article of war, but regular officers may now sit on courts-martial for the trial of volunteer officers or soldiers.

* * * * *

By command of Major-General Miles:

H. C. CORBIN,
Adjutant-General.

APPENDIX 3.

INVALID CORPS, VETERAN RESERVE CORPS, VETERAN VOLUNTEERS, AND UNITED STATES COLORED TROOPS.

The Invalid Corps, afterwards known as the Veteran Reserve Corps, was raised under the following War Department orders:

General Orders, No. 105.

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, April 28, 1863.

The organization of an invalid corps is hereby authorized.

This corps shall consist of companies, and, if it shall hereafter be thought best, of battalions.

The companies shall be made up from the following sources, viz:

First. By taking those officers and enlisted men of commands now in the field (whether actually present or temporarily absent) who, from wounds received in action or disease contracted in the line of duty, are unfit for field service, but are still capable of effective garrison duty, or such other light duty as may be required of an invalid corps. Regimental commanders shall at once make out from information received from their medical and company officers, and from their own knowledge, rolls (according to the form furnished) of the names of all the officers and enlisted men under their commands who fulfill the following conditions, viz:

1. That they are unfit for active field service on account of wounds or disease contracted in the line of

duty; this fact being certified by a medical officer in the service, after personal examination.

2. That they are fit for garrison duty; this fact being likewise certified by the medical officer, as above, after personal examination.

3. That they are, in the opinion of their commanding officers, meritorious and deserving.

These rolls shall be certified by the examining surgeon and regimental commander, and transmitted, through the regular channels of military correspondence, to the Provost-Marshal-General of the United States.

The regimental commander shall enter into the column of remarks, opposite each officer's name on the roll, a statement as to the general character of the officer for intelligence, industry, sobriety, and attention to duty; and all intermediate commanders shall indorse thereon such facts as they may possess in the case, or, if they have none, they shall state how far they are willing to indorse the opinion of the officer or officers making the recommendation. Similar rolls shall be forwarded, from time to time, whenever the number of men fulfilling the conditions enumerated or the exigencies of the service may render it expedient.

Second. By taking those officers and enlisted men still in service and borne on the rolls, but who are absent from duty, in hospitals or convalescent camps, or are otherwise under the control of medical officers. In these cases the medical officer in attendance shall prepare the rolls according to form, entering the names of officers and men from the same regiment on a roll by themselves, and send them, with the certificate of the surgeon, duly signed, to the proper regimental commander, who will forward them, as heretofore specified, subject to the same conditions and

requirements. If, in any case, the regimental commander shall think an officer unfit, in point of character, to continue in the service of the Invalid Corps, though disabled and certified by the surgeon, he will state his objection in the column of remarks and note the exception before signing the certificate. If any officer or enlisted man now in service, but absent and beyond the reach of a medical officer in charge of a hospital or convalescent camp, desires to enter this corps, he will take the course indicated below for those who have been honorably discharged the service.

Third. By accepting those officers and enlisted men who have been honorably discharged on account of wounds or disease contracted in the line of duty, and who desire to reenter the service. In the case of an officer, application for appointment must be made to the provost-marshal-general of the United States through the officer detailed as acting assistant provost-marshal-general of the State. No application of this kind will be considered unless the following conditions are completely fulfilled:

1. That the applicant produce the certificate of the surgeon of the board of enrollment for the district in which he resides that he is unfit for active field duty on account of wounds or disease, and is not liable to draft, but is fit for garrison duty.

2. That he furnish evidence of honorable discharge on account of wounds or disability contracted in the line of duty.

3. That he produce recommendations from the regimental, brigade, and division commanders under whom he formerly served, that he is worthy of being thus provided for and capable of returning adequate service to the Government. In case it shall be impracticable

to get this last evidence, he may, having established the first two points above, satisfy the board of enrollment that he is deserving, and present its certificate of the fact. This evidence must all be obtained by the applicant, and must be transmitted with his application for appointment.

If there be no acting assistant provost-marshal-general for the State the application may be forwarded through the adjutant-general of the State, who is desired to indorse thereon such facts in the military history of the applicant as he may know, or as are afforded by his records, and forward the same to the provost-marshal-general of the United States. Enlisted men, honorably discharged on account of disability, desiring to reenlist in this corps will present themselves to the board of enrollment for the district in which they reside for examination by the surgeon thereof, who shall examine them and report the result to the board of enrollment.

The board shall then consider each case, and if the applicant is found to fulfill the conditions specified below the board shall give him a certificate to that effect, viz:

1. That he is unfit for service in the field.
2. That he is fit for garrison duty.
3. That he is meritorious and deserving.
4. That he was honorably discharged from the service.

The provost-marshal for the district shall then send the application with this certificate of the board to the acting assistant provost-marshal-general of the State, who shall procure such evidence of service and character as the records of the company to which he belonged, on file at the headquarters of the State, may show, and

if satisfied that it is a meritorious case and that the man is deserving he will enlist him in accordance with such special rules as the provost-marshal-general may establish.

Medical inspectors, surgeons in charge of hospitals, military commanders, and all others having authority to discharge, under existing laws and regulations, are forbidden to grant discharges to any men under their control who may be fit for service in the Invalid Corps.

The provost-marshal-general is charged with the execution of this order, and the troops organized under it will be under the control of his bureau.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant-General.

General Orders, No. 111.

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, March 18, 1864.

The name of the organization authorized by General Orders, No. 105, War Department, 1863, as an "Invalid Corps," is hereby changed to that of "Veteran Reserve Corps." All orders relating to the Invalid Corps will remain in force, as at present, with respect to the Veteran Reserve Corps.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant-General.

The veteran volunteers, afterwards created an army corps, were organized under the following orders:

GENERAL ORDERS, No. 191.

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE, *Washington, June 25, 1863.*

FOR RECRUITING VETERAN VOLUNTEERS.

In order to increase the armies now in the field, volunteer infantry, cavalry, and artillery may be enlisted at any time within ninety days from this date, in the respective States, under the regulations hereinafter mentioned. The volunteers so enlisted, and such of the three years' troops now in the field as may reenlist in accordance with the provisions of this order, will constitute a force to be designated "Veteran Volunteers." The regulations for enlisting this force are as follows:

1. The period of service for the enlistments and reenlistments above mentioned shall be for three years or during the war.

2. All able-bodied men, between the ages of eighteen and forty-five years, who have heretofore been enlisted, and have served for not less than nine months, and can pass the examination required by the mustering regulations of the United States, may be enlisted under this order as Veteran Volunteers, in accordance with the provisions hereinafter set forth.

4. If the Government shall not require these troops for the full period of three years, and they shall be mustered honorably out of service before the expiration of their term of enlistment, they shall receive, upon being mustered out, the whole amount of bounty remaining unpaid, the same as if the full term had been served. The legal heirs of volunteers who die in service shall be entitled to receive the whole bounty remaining unpaid at the time of the soldier's death.

5. Veteran volunteers enlisted under this order will be permitted at their option to enter old regiments now in the field; but their service will continue for the full term of their own enlistment, notwithstanding the expiration of the term for which the regiment was originally enlisted. New organizations will be officered only by persons who have been in service, and have shown themselves properly qualified for command. As a badge of honorable distinction, "service chevrons" will be furnished by the War Department, to be worn by the veteran volunteers.

6. Officers of regiments whose terms have expired will be authorized, on proper application, and approval of their respective governors, to raise companies and regiments within the period of sixty days; and if the company or regiment authorized to be raised shall be filled up and mustered into service within the said period of sixty days, the officers may be recommissioned of the date of their original commissions, and for the time engaged in recruiting they will be entitled to receive the pay belonging to their rank.

7. Volunteers or militia now in service whose term of service will expire within ninety days, and who shall then have been in service at least nine months, shall be entitled to the aforesaid bounty and premium of $402, provided they reenlist before the expiration of their present term for three years or the war; and said bounty and premium shall be paid in the manner herein provided for other troops reentering the service. The new term will commence from date of reenlistment.

8. After the expiration of ninety days from this date, volunteers serving in three years' organizations, who may reenlist for three years or the war,

shall be entitled to the aforesaid bounty and premium of $402, to be paid in the manner herein provided for other troops reentering the service. The new term will commence from date of reenlistment.

9. Officers in service whose regiments or companies may reenlist, in accordance with the provisions of this order, before the expiration of their present term, shall have their commissions continued, so as to preserve their date of rank as fixed by their original muster into United States service.

10. As soon after the expiration of their original term of enlistment as the exigencies of the service will permit, a furlough of thirty days will be granted to men who may reenlist in accordance with the provisions of this order.

11. Volunteers enlisted under this order will be credited as three years' men in the quotas of their respective States. Instructions for the appointment of recruiting officers and for enlisting veteran volunteers will be immediately issued to the governors of States.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant-General.

General Orders, No. 287.

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, November 28, 1864.

ORDER FOR RAISING AND ORGANIZING A NEW VOLUNTEER ARMY CORPS.

1. That an army corps to consist of not less than twenty thousand infantry, and enlisted for not less than one year, to be designated the First Corps, shall

be organized in the District of Columbia, commencing the organization on the first day of December, 1864, and continuing until the first day of January next. The privates to consist only of able-bodied men who have served honorably not less than two years, and therefore not subject to draft; the officers to be commissioned from such as have honorably served not less than two years.

2. Recruits will be furnished transportation to Washington; will be credited to the district in which they or their families are domiciled; and will be paid a special bounty of three hundred dollars, from the substitute fund, upon being mustered into service. Each recruit who preserves his arms to the end of his term may retain them as his own, upon being honorably discharged from service.

3. Details of organization will be prescribed by the Adjutant-General. The heads of bureaus will detail competent officers for the prompt examination and organization, arming, equipping, and supplying the corps.

4. Major-General Hancock is assigned to the command of this corps, headquarters at Washington.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant-General.

The United States colored troops were authorized by section 24 of the act of February 24, 1864, above set forth. (Appendix 1, p. 18.)

Office Supreme Court U.S.
FILED
APR 26 1902
JAMES H. McKENNEY,
Clerk

No. 610.

Brief of J. K. Cammon & Hayden for Appellee.

Supreme Court of the United States.

Filed Apr. 26, 1902.

ROBERT W. McLAUGHRY, AS WARDEN OF THE U. S. PENITENTIARY AT FORT LEAVENWORTH, KANSAS,

APPELLANT, } No. 610.

v.

PETER C. DEMING.

Appeal from the Circuit Court of the United States for the District of Kansas.

BRIEF FOR THE APPELLEE.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Appellee.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1902.

IN THE

Supreme Court of the United States.

ROBERT W. McLAUGHRY, as Warden of the U. S. Penitentiary at Fort Leavenworth, Kansas,
Appellant,
v.
PETER C. DEMING.
No 610.

Appeal from the Circuit Court of the United States for the District of Kansas.

BRIEF FOR THE APPELLEE.

Statement of the Case.

The appellee, Deming, being imprisoned in the United States Penitentiary, at Fort Leavenworth, filed his petition for a writ of *habeas corpus*, in the court below, on September 11, 1901 (*pp.* 1–3). The writ was issued on February 22, 1902, and served upon the respondent McLaughry, the warden of the prison (*pp.* 3–4), who, in due course, made answer (*pp.* 4–22). To this answer, Deming demurred (*p.* 22). After hearing on demurrer, the court ordered his release, but the respondent having taken an appeal to this court (*p.* 24), it was provided by the order that he should furnish bail in the sum of $2,000, and should be remanded to custody, pending the

giving and approval of his bond (*p.* 23). The bond was given and approved and he was released (*pp.* 24-25.)

The facts, presented by the pleadings are matters of record, concerning which there can be no issue. On June 6, 1898, Deming was appointed a commissary of subsistence with the rank of captain of United States volunteers, pursuant to the provisions of the act of April 22, 1898, entitled "*An act to provide for temporarily increasing the military establishment of the United States in time of war.*" (30 *Stat. L.*, 361.) This fixed the term of his enlistment at "two years, unless sooner terminated" (*Sec.* 4). Subsequently he was continued in the volunteer service by order of the President issued pursuant to the provisions of the act of March 2, 1899, entitled "*An act for increasing the efficiency of the army of the United States.*" (30 *Stat. L.*, 977.) Under the President's order his service could not have been continued beyond June 30, 1901. (*Id.*, *p.* 981, *Sec.* 15.) On March 29, 1900, General Shafter, assuming to act as the commander of the Department of California, issued an order (*pp.* 1, 2, 4), whereby he attempted to appoint a general court-martial for the trial of Captain Deming, as an assistant commissary of subsistence of volunteers. General Shafter was then upwards of sixty-four years of age, and was a retired officer, but had a commission as major-general of volunteers (*pp.* 1, 3; *see also* "*Official Register of Officers of Volunteers, etc., June* 1, 1900," *p.* 7). All of the officers named in the order as the "detail for the court," held and were serving under commissions in the regular army. None of them held commissions in the volunteer service (*pp.* 2, 4). The court so organized and constituted proceeded to try Deming, and thereupon sentenced him to be dismissed from the service of the United States, and to be confined

in such penitentiary as the reviewing authority might direct, for a period of three years (*pp.* 1, 4, 8). This sentence was approved by Shafter and confirmed by the President (*pp.* 1, 8). The warrant or mittimus, by virtue of which Deming was imprisoned, was this order, issued from the headquarters of the army (*pp.* 1, 9):

> "By direction of the Secretary of War, Captain Peter C. Deming, Assistant Commissary of Subsistence, U. S. Volunteers, ceases to be an officer of the Army from June 12, 1900, and the United States penitentiary at Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the Commanding General, Department of California, under proper guard."

The petition shows that, by reason of the foregoing facts, General Shafter had no authority to appoint a general court-martial, hence, that his order did not create one; that the officers detailed for the court were not authorized to act as a court-martial, and each one was prohibited by law from trying Deming, wherefore his arraignment, trial, and sentence were without warrant, and in violation of law, and void; his imprisonment was unlawful, and thereby he was deprived of his liberty without due process of law, in violation of his rights, guaranteed by Article V of the Amendments to the Constitution (*pp.* 2–3).

The return, or answer of the respondent (pp. 4–22), sets out, at length, the various proceedings, including the order, purporting to appoint the court, the record of the alleged trial, and the endorsements made thereon by the reviewing authorities. It asserts that all of the proceedings were had in conformity with law, and that the ensuing imprisonment of Deming was lawful. The only issues raised in, and decided by the court below, were questions of law, involving the construction

and application of Article V of the Amendments to the Constitution and of certain acts of Congress. On this appeal, which is taken by the respondent in his own behalf and on the behalf of the United States, there is but one assignment of error. It makes the broad and sweeping charge that the court below erred in deciding that the facts set forth in the answer did not justify the imprisonment of Deming, and that he was entitled to be released. The case can be considered most conveniently by classifying the questions raised under three general propositions: (1) The officers who tried Deming did not constitute a court-martial or other lawful tribunal, wherefore their proceedings and sentence were void. (2) The officers in question were individually and collectively incompetent to sit upon a court-martial to try Deming, and for that reason, alone, their proceedings were unlawful and void. (3) Being imprisoned without due process of and contrary to law, Deming was entitled to seek his remedy in the federal courts, and to obtain his release through *habeas corpus* proceedings.

Argument.

I.

The officers who tried and sentenced Deming never had any authority to convene or act as a general court-martial, and all things done by them, or by the reviewing authorities pursuant to their sentence, were unauthorized by and contrary to law, and were void.

The statute which regulates all things appertaining to courts-martial (*R. S. U. S., Sec.* 1342), has an object far more important than the securing of a uniform procedure in the trial or punishment of persons charged or found

guilty of military offenses. The exigencies of the military service and public necessity require that officers and soldiers of all troops, mustered in the service of the United States, shall at all times be governed by the articles of war and subject to be tried by courts-martial (*Id., Art.* 64; *Act of April* 22, 1898, *Sec.* 6, *supra*). The effect of this is to subject the persons, concerned, to rules more stringent than those imposed upon other citizens, and to deprive them, when charged with certain offences, of the right to trial by jury, before a court, learned in the law. Through lack of education and experience, officers sitting upon a court-martial, neither know nor can they correctly apply the principles of law, adherence to which has come to be regarded as essential to the administration of justice. Again: conviction by a court-martial may be had by vote of a majority of its members. While Congress appreciated that in these particulars persons in the military service must forfeit certain of the privileges of civilians, it was careful to define the extent of the forfeiture, and as the best practicable safeguard against the infliction of unjust punishments, laid down explicit rules to govern the appointment, organization and proceedings of courts-martial. It defined their jurisdiction, with respect to the persons and causes triable; and prescribed the manner in which their sentences must be confirmed and executed.

This leads us to make the following inquiries: What is a court-martial? How can such a court be created? How must it proceed? What is the effect of a failure to observe any one of the statutory requirements? These questions have been passed upon by this court, and have received the consideration of able writers upon military law.

In the case of *Runkle* v. *United States* (122 *U. S.* 543, 561) Chief Justice Waite, delivering the opinion of the court, said:

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved (3 *Greenl. Ev. Sec.* 470; *Brooks* v. *Adams*, 11 *Pick.* 441, 442; *Mills* v. *Martin*, 19 *Johns*, 33; *Duffield* v. *Smith*, 3 *Serg. & R.* 590, 599). Such also is the effect of the decision of this court in *Wise v. Withers* (3 *Cranch*, 331), which, according to the interpretation given it by Chief Justice Marshall in *ex parte Watkins* (3 *Peters*, 193, 207), ranked a court-martial as: '*One of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.*' *To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law* (*Dynes* v. *Hoover*, 20 *How.* 65, 80; *Mills* v. *Martin*, 19 *Johns.* 33). *There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in Brown* v. *Keene* (8 *Pet.* 112, 115), *in respect to averments of jurisdiction in the courts of the United States applies, and his language is*: '*The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which the jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.*' *All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.*"

General Davis, the present Judge Advocate General of

the Army, in his work, entitled "*Military Laws of the United States*" (*Ed. of* 1898, *p.* 15), said:

> "Courts-martial are no part of the judiciary of the United States, but simply instrumentalities of the executive power. They are creatures of *orders*. The power to convene them, as well as the power to act upon their proceedings, being an attribute of command."

Again, he said (*Id.*, *p.* 42):

> "Courts-martial * * * are courts of limited jurisdiction, and as such their records must show affirmatively that they have authority to hear and determine cases coming before them for trial."

Col. Winthrop, a well-recognized authority on military law, has expressed the same view with regard to the status of courts-martial (*Winthrop's Military Law, etc.*, *pp.* 53–55).

It is clear, and is conceded by the appellant, that a court-martial is not a court, according to the ordinarily accepted meaning of that term. Forming no part of the judicial system, and having no permanent organization, nor any general jurisdiction, there is no presumption in favor of its existence, or of the regularity or validity of its proceedings. All of these things must affirmatively appear from the record of the tribunal, assuming to act as a court-martial, in order that its sentence shall have any validity in law, or furnish justification for persons, assuming to confirm or execute its sentence. At common law, there prevailed a presumption in favor of the validity of the judgments of a tribunal assuming to act as a court of general jurisdiction, but it was not conclusive. Such a presumption has not been generally recog-

nized in this country, and upon proof that the alleged court was convened or organized in a manner unauthorized or forbidden, its judgments will be decared null and void, *ab initio*. In the case of *Brumley* v. *State* (20 *Ark.* 78), it was said:

> "The meeting together of the judges and officers of a court at the place, but not at the time fixed by law for holding the court, was not a court under our constitution and laws, but was a mere collection of officers, whose acts must be regarded as *coram non judice* and void."

It appears from the "*Official Register of Officers of Volunteers, etc.*" (*supra, p.* 7), which was published by authority of the Secretary of War on June 1, 1900, that General Shafter had served as an officer of the regular army until October 16, 1899, when he was retired from active service. It is stated in the petition (*p.* 1) and conceded that he had then reached the age of sixty-four years. It was claimed in the answer of the respondent (*p.* 4) that on March 29, 1900, when the order providing for the appointment of a court-martial to try Deming, was issued by him, Shafter was a major-general of volunteers, exercising the command of the Department of California, by virtue of an assignment of the President of the United States, as commander-in-chief of the army. This proposition is untenable for two reasons:

(*a*) The act of June 30, 1882, entitled, "*An Act making appropriations for the support of the army*," *etc.* (22 *Stat. L.* 117, 118), provides:

> "That on and after the passage of this Act, when an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the Presi-

dent, be retired from active service and placed on the retired list, *and when an officer is sixty-four years of age, he shall be retired from active service and placed on the retired list.*"

The Act of March 2, 1899 (30 *Stat. L.*, 977, 979, *Sec.* 2, *second proviso*), reads:

> "That *in time of war*, retired officers of the army may, in the discretion of the President, be employed on active duty, *other than in command of troops*, and when so employed they shall receive the full pay and allowances of their grades."

Under the provisions of the act of 1882 (*supra*), the retirement of General Shafter, on October 16, 1899, was compulsory. Neither he nor the President had any option in the matter. The provisions of the acts of 1882 and 1899 (*supra*) were applicable alike to service in the regular and in the volunteer force. After his retirement General Shafter's employment on active duty would have been lawful, only "*in time of war*," if war had existed. His employment in time of peace was prohibited. On March 29, 1900, a state of war did not exist in California, or elsewhere in the United States. The only war in which the United States has been engaged, of recent years, was that with Spain, which was terminated by the treaty of Paris, concluded on December 10, 1898. Since then the existence of war, to which the United States was a party, has not been recognized by Congress, or the Executive, or by a foreign State. Without such a recognition, a state of war cannot exist. From the cessation of hostilities—even before the conclusion of the treaty of Paris—proclamations made by the President show that peace has prevailed without interruption. (*Proclamations of October*

28, 1898, *October* 25, 1899, *and October* 29, 1900.) In the spring of 1900, quiet and good order prevailed throughout California. All functions of government were proceeding in a normal manner, being discharged by the civil authorities without the intervention of the military authorities, or resort to martial law. The civil commotions and isolated acts of resistance to the authority of the United States then occurring in certain parts of the Philippine Islands did not constitute a state of war, even at the place of their occurrence, but in no event could conditions prevailing in the Philippines affect the status of territory comprehended within the military department of California, or any other portion of the United States where profound peace prevailed. (*The Protector*, 12 *Wall.* 700; *Ford* v. *Surget*, 97 *U. S.* 594; *Heflebower* v. *United States*, 21 *C. Cls.* 228, 233.) These things were well understood by the War Department, for in 1900 the army was not organized on a war footing as provided by the act of 1898 (*Sec.* 9). It was divided into territorial departments, the method of organization which prevails in time of peace.

(*b*) If a state of war had existed on March 29, 1900, General Shafter, being a retired officer, could not, lawfully, have been assigned to duty as the commander of the Department of California. As we have seen the act of March 2, 1899 (30 *Stat. L.* 977, 979), which authorizes the employment of retired officers on active duty "*in time of war*," expressly provides that the duties on which they may be employed shall be "*other than in command of troops.*" The regulations for the army, published by the Secretary of War, under the President's direction, prescribe the duties of the commander of a department. Among other things it is provided (*U. S. Army Regulations, p.* 31):

> "208. The commander of a department *commands all the military forces of the Government within its limits*, whether of the line or staff." * * *

As the commanding officer of the Department of California, General Shafter actually exercised command of the troops stationed therein. This was contrary to law. The law regulating the appointment of general courts-martial is contained in the 72d article of war, which reads:

> "Any general officer commanding an army, *territorial division* or a department, or colonel commanding a separate department, may appoint general courts-martial, whenever necessary."

The power to order a court-martial is undoubtedly an attribute of command. (*Davis, Military Laws of U. S., supra, p.* 15.) In order to give validity to such an order, it must affirmatively appear that the officer who made it was a general officer: (1) lawfully retained upon active duty, (2) having command of an army, territorial division, or department. We have seen that General Shafter did not possess either of these qualifications. In assuming to order a general court-martial, he did that which the law did not permit, and his order and all acts done in consequence thereof, were null and void. (*Runkle* v. *United States*, 122 *U. S.* 543; *Dynes* v. *Hoover*, 20 *How'd*, 65 *supra.*)

Where several officers come together and proceed to discharge the functions of a court-martial without authority to do so, no subsequent act of the reviewing authority can operate retroactively to invest them with a judicial character or with jurisdiction which they did not possess, or clothe their invalid acts with any species of validity. Deming was not tried by a lawful tribunal, and in contemplation of law there was no sentence imposed upon him,

which could either be confirmed or executed. The warrant or mittimus, set up by the respondent, as his justification for Deming's imprisonment, cannot afford him any justification. Deming was deprived of his liberty without due process of law.

Ex parte Reed (100 *U. S.* 23); *Ex parte Watkins* (3 *Pet.* 193); *In re Glenn* (54 *Md.* 572); *Commonwealth* v. *Leckey* (1 *Watts, Penn.* 66); *Bell* v. *State* (4 *Gill, Md.* 305).

Counsel for the respondent will probably argue that there is no age limit, beyond which officers of volunteers cannot be retained in active service. We have seen, however, that such a limit is prescribed for volunteers as well as for regulars by the act of 1882 (*supra*). Doubtless they will argue that inasmuch as Shafter's appointment in the Volunteer Army was authorized by the act of 1898 (Section 11), he was entitled to remain on active duty as a volunteer, in spite of his retirement as a regular. To sustain such an argument they must also maintain that the section of the act of 1898, being a general provision of law with respect to the appointment of officers of the regular army as officers of volunteers, was not in any way limited by the second provision of Section 7, of the act of 1899, which is specific and forbade the employment of retired officers on active duty, except in time of war, and forbade their assignment to the command of troops, at any time. The later and specific statute is in accord with the general rule that has prevailed with regard to the employment of retired officers on active duty. It must be regarded as a controlling limitation upon the earlier and more general provision of law. (*Rodgers* v. *United States*, *No.* 317, *October Term*, 1901.)

II.

Irrespective of the fact that the officers who tried Deming, did not constitute a general court-martial, they were individually and collectively incompetent to try him. All of their proceedings and the ensuing acts of the reviewing authorities were void.

The alleged court-martial was composed of officers of the regular army, all of whom were serving under their commissions therein. Deming was a volunteer, and as such was accused, arraigned, tried and sentenced.

The 77th article of war (*Sec.* 1342 *R. S. U. S.*) is this:

> "ART. 77. *Officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article* 78."

Article 78 has no bearing upon this case. It relates to trials of persons belonging to the regular army and the marine corps, when forces from the two are acting together.

In this and in other cases which have arisen since the outbreak of the late war with Spain, officers of the regular army have been detailed for courts-martial to try officers and soldiers of volunteers. A circular issued by the War Department on June 30, 1898 (*Circular No.* 21, *Headquarters of the Army*) made the announcement that under the provisions of the act of April 22, 1898 (*supra*), the regular army and the volunteer army did not constitute separate forces, and therefore officers of the regular army were competent to sit on courts-martial to try officers and soldiers of the volunteer service. Such "a departmental construction of statutes will not be fol-

lowed by the courts when it is clearly erroneous" (*U. S.* v. *Tanner*, 147 *U. S.* 661). To justify such an interpretation of the act of 1898 it is necessary to assume that Congress intended it to operate as a repeal of the 77th article of war, or to render it inoperative, and a dead letter, in so far as it relates to volunteers or persons who are serving temporarily in the military service of the United States, as distinguished from militia or State troops mustered in the federal service. Congress has never in express terms repealed or annulled the article. Repeals and annulments by implication are not favored in law. The courts have never adopted such an implication unless compelled to do so by the utter inconsistency or repugnance of the provisions of an older and a later statute. Mr. Justice Story, delivering the opinion of this court in the case of *Wood* v. *United States* (16 *Peters*, 342, 362), said:

> "That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative, accumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication, only, *pro tanto*, to the extent of the repugnancy."

In the case of *State* v. *Stoll* (17 *Wall.* 425, 430), it was said:

> "If by any reasonable construction the two statutes can stand together they must so stand."

In the case *Cope* v. *Cope* (137 *U. S.* 682), it was said:

> "Nothing is better settled than that repeals, and the same may be said of annulments by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction."

The obvious purpose of the 77th Article of War will be sustained by the courts, notwithstanding that it may have received a contrary construction by the War Department. (*Webster* v. *Tucker*, 163 *U. S.* 331.)

A brief inquiry into its origin will give us an understanding of its meaning and scope, and will show that it was intended to apply to a force such as that made up of the volunteers who were enlisted in the service of the United States, during the years 1898 to 1899.

It was enacted in 1874 and then supplanted Article 97 of the Military Code of 1806 (2 *Stat. L.* 359), which provided:

> "The officers and soldiers of any troops, whether militia or others, being mustered in the pay of the United States, shall at all times and in all places when joined or acting in conjunction with the regular forces of the United States be governed by these rules and articles of war, *and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces save only that such courts-martial shall be composed entirely of militia officers.*"

This article had its origin in similar provisions contained in the military codes of 1775 and 1776, which like Article 97 were adapted to the conditions, prevailing at the time of their enactment. Prior to 1806, the United

States had never organized a force of United States volunteers, as distinguished from militia organizations, mustered in the service of the United States which, though subject to the military laws of the United States, while in its service, retained their status as State troops and did not form part of the Army of the United States. It was not until the War of the Rebellion that a volunteer force was organized by direct enlistment in the federal service. It then became a serious question, whether Article 97 made officers of the regular army incompetent to sit on courts-martial to try officers and soldiers of the volunteer force. To relieve the situation of all doubt—to prohibit the trial of any person in the temporary military establishment by officers of the Regular Army, or permanent organization—Congress, in 1874, enacted the 77th Article of War (*supra*). To deny this is to contend that the act of 1874 had no effect beyond that of 1806. Counsel for the appellant actually make the assertion that the 77th article was no more than a re-enactment of the former 97th article. This, in spite of the radical difference of the language employed and of the fact that in 1874 Congress had a kind of force to provide for, which in 1806, had neither existed, nor could its existence be anticipated. It is worth while to compare the two articles carefully.

Code of 1806—Art. 97.	Code of 1874—Art. 77.
"*The officers and soldiers of any troops, whether* MILITIA *or others* * * * *shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of* MILITIA OFFICERS."	"*Officers of the regular army shall not be competent to sit on courts-martial to try officers or soldiers of other forces.* * * *"

Nothing could be plainer than that Congress wished to place volunteers and all other persons in the temporary

service, upon the same basis, for purposes of trial as the militia.

General Benét, in a treatise on military law, written in 1866, after the first employment of United States volunteers, said (*Benét, Military Law, p.* 25):

> "The words, 'militia officers,' as employed in the 97th article (code of 1806) have been interpreted as synonymous so far as the organization of courts-martial is concerned with volunteer officers. This construction accords with the *spirit* of the article, and in its practical enforcement the object of the rule is accomplished. A court composed of regular officers cannot try a volunteer officer, though a regular officer may be tried by a court of volunteers."

In Winthrop's Military Law and Precedents (*Vol. I, p.* 92), it is said:

> "By '*regular army*' is to be understood the *permanent military establishment as especially distinguished from* VOLUNTEERS *or* MILITIA *in the federal service.* These two contingents, volunteers and militia, are indeed quite distinct from each other. *The former, as will be further illustrated in the next chapter, being for the time equally with regulars, a part of the Army of the United States, while the latter, though in the employment of the nation, are State troops. But in view of the comprehensive and general term 'officers and soldiers of* OTHER FORCES,' *the article* (77*th article of war*) *has been considered as disqualifying regular officers from acting as members of courts-martial for the trial of any officers or soldiers not of the Regular Army, whether volunteers, militia, drafted men, or any persons, except the class of* MARINES *designated in the next article* (78). *Thus a court composed entirely of regular officers cannot legally be ordered for the trial of an officer or soldier of another military force, nor where such a*

court has been once duly created for the trial of a regular or regulars is it qualified to proceed to the trial of a volunteer, etc., if brought before it for trial. And where a court is not entirely, but only partly so composed, even if it comprises five officers of another force, eligible for the particular trial, it cannot, legally, proceed to such trial."

In his work entitled "*Abridgment of Military Law*," Col. Winthrop said of the 77th article of war (p. 29):

"*Regular officers cannot as members of courts-martial legally take part in the trial of volunteers, or militia officers, or soldiers. On the other hand, however, there is no law to prevent the officers of volunteers or militia in service in time of war, from acting as members of courts-martial for the trial of regular officers, or soldiers. In the late war (Rebellion) volunteer officers were not infrequently detailed upon such courts.*"

Again in the same work he said (*p.* 37):

"*In time of war the regular contingent has commonly been supplemented by a force of volunteer troops; in the late war (Rebellion) indeed the volunteers composed by far the greater portion of our army. Though in some particulars of its organization, assimilated to the militia, this force, in fact as well as in law, is quite distinct therefrom.* * * * *That this force (volunteers) though differing from the regulars in that it is resorted to for a temporary purpose is equally, with the latter, a part of the Army of the United States, has been expressly adjudicated.*"

Another well recognized authority (*Davis: Military Laws of the United States; Ed. of* 1897, *p.* 490, *Note* 1), said:

"*Although officers and soldiers of volunteers, not being militia, are as much a part of the Army*

of the United States as are regular officers, yet in in view of the terms of this article (77), an officer of the regular army, so-called, would not be eligible to detail as a member of a court-martial convened for the trial of volunteer officers or soldiers, nor when duly detailed as a member of a court-martial would he be competent to take part in a trial of a volunteer by such court."

In an opinion of the Judge Advocate General of the Army (*Dig. Opin., J. A. G., p.* 745), it was held:

"*The volunteer force during the late war (Rebellion) was not a part of the militia, but of the Army of the United States. Though assimilated to the militia in some respects, as for example, in the mode of original appointment of regimental and company officers, it was as distinct in law from the militia as was the so-called regular contingent of the army.*"

The laws which forbade and still forbid regulars to try volunteers, are not mere arbitrary regulations, but had its foundation in reason and justice. The conditions affecting regulars and volunteers are radically different. The latter, like the militia, forsake the pursuits of civil life in response to their country's call to arms, and necessarily lack the training, experience, and knowledge of military affairs which the professional soldiers of the regular army should have. For these reasons Congress directed that volunteers, as well as other persons in the temporary force, for infractions of discipline, should have the same safeguard that is accorded to all citizens of the United States, namely, the right to trial by their peers, and should not be subject to trial by men, who would exact of them a standard, which the professional soldier, with no life work other than that of arms, would surely demand. Again: it is a matter of uni-

versal knowledge, both in the Army and out of it, that officers of the regular army regard with dislike and jealousy the conferring of commissions upon volunteers because, without previous military experience, the latter become the equals or superiors of men who have rendered years of service. Congress, appreciating that this dislike and jealousy must warp the judgment of regulars and lead to acts of injustice, forbade that regulars should try volunteers.

Since the passage of the act of April 22, 1898 (*supra*), the War Department has acted upon the supposition, and the respondent now contends, that volunteers enlisted under that act were not volunteers in the ordinary sense, but in spite of being so termed were, in effect, short-term regulars, and together with the permanent organization, constituted one and the same "force." The language of the act, itself, shows the fallacy of this position. Congress intended to preserve the distinction between the permanent and the temporary organizations. While both are spoken of as being included in the Army of the United States, the permanent and the temporary establishments were to constitute distinct branches and be known as the Regular Army and the Volunteer Army, respectively, the latter including the volunteers and the militia when in service. This is the language employed (*Sections* 2, 3, *and* 4):

> "SEC. 2. That the organized and active land forces of the United States shall consist of the Army of the United States and of the militia of the several States when called into the service of the United States: *Provided, That in time of war the Army shall consist of two branches which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States.*

"SEC. 3. *That the Regular Army is the permanent military establishment, which is maintained both in peace and war according to law.*

"SEC. 4. *That the Volunteer Army shall be maintained only during the existence of war, or while war is imminent, and shall be raised and organized, as in this Act provided, only after Congress has or shall have authorized the President to raise such a force or to call into the actual service of the United States the militia of the several States.*"

The War Department's interpretation of the act in so far as it relates to trials of volunteers, is as follows (*Circular No.* 21, *June* 30, 1898, *supra*):

> "As the act to provide for temporarily increasing the military establishment of the United States in time of war, approved April 22, 1898, declares that the Army of the United States in time of war shall consist of both the regular army and the volunteer army, it cannot be held that the volunteer army is, with reference to the Regular Army 'other forces,' within the meaning of the 77th article of war, but regular officers may now sit on courts-martial for the trial of volunteer officers or soldiers."

The official responsible for this circular evidently labored under the erroneous impression that it was not until after the passage of the act of 1898 that United States volunteers, when in active service, constituted equally with regulars a part of the Army of the United States. We have just quoted the leading authorities all of which take the opposite view. The status of the volunteers was left by the act of 1898 precisely as it had been before 1874, when the 77th article of war was enacted. Because Congress said that the "land *forces*" of the United States in time of war should consist of two "branches," it cannot be assumed to have meant that those two "branches"

should constitute one "force," the effect of this being to repeal the 77th article of war and deprive volunteers of the safeguard against injustice, which, from the very foundation of the nation, had been provided for those temporarily employed in its military service. The act of 1898 contains many provisions which relate to the volunteer army alone, such as the manner in which its officers should be appointed, and its men enlisted, the term of their service, and like matters, all of which are very different from similar provisions of law applicable to the regular army, alone. This shows that Congress intended to preserve the integrity of the volunteer force, although, as in all former instances, that force was to be "*organized under and subject to the laws, orders, and regulations (including Article 77), governing the regular army.*" A striking instance of this, showing that Congress appreciated the necessity for continuing the operation of the 77th article of war, is found in the 14th section of the act, which reads:

> "That the general commanding a separate department or a detached army is authorized to appoint from time to time military boards of not less than three or more than *five volunteer officers of the volunteer army* to examine into the capacity, qualifications, conduct and efficiency of any commissioned officer of said army within his command."

Here Congress was careful to limit the composition of the boards, not only to officers of the volunteer army, but volunteer officers, as distinguished from regular officers serving temporarily under volunteer commissions.

If the formal designation of the "Volunteer Army," provided for by the act of 1898, as a "*force*," were essential, to show that that "army," or "branch" of the army of the United States, constituted a force other than that of

the "Regular Army," within the meaning of the 77th Article of War, proof that such was the intention of Congress and that the War Department's interpretation of the act was contrary to the legislative intendment is found in subsequent legislation. The act of May 11, 1898 (30 *Stat. L.* 405), provided:

> "That in addition to the volunteer *forces* provided for by the act of April 22, 1898, * * * the President may authorize the Secretary of War to organize * * * "
>
> "SEC. 2. And the President is further empowered during the present war under the act of April 22, 1898, to authorize the Secretary of War to organize an additional volunteer *force*. * * * "

We have seen that Deming was enlisted in the volunteer service pursuant to the provisions of the act of April 22, 1898. The *Official Register of Officers of Volunteers* (*supra, p.* 20), shows that he received no commission other than that issued to him at the time of his appointment, on June 6, 1898. He was, however, retained in the military service by order of the President, made pursuant to the provisions of the Act of March 2, 1899. Let us see whether that act or the orders of the President, made pursuant thereto, changed the status of the volunteers who were retained in the service, and constituted them short-term regulars or a portion of the "force" which included the regular army. The act (30 *Stat. L. pp.* 977 *et seq.*) made provision for the composition of the "Army of the United States," giving the number of officers to be retained in each of the grades thereof (*Sec.* 1). It prescribed the composition of cavalry regiments (*Sec.* 2); artillery regiments (*Sec.* 3), and infantry regiments (*Sec.* 4). It authorized the filling of certain vacancies in the army (*Sec.* 5). It made provision for the organization

of certain staff and auxiliary departments (*Secs.* 6 *to* 11). All of these sections related to the permanent military establishment, or regular army, the maximum strength of which was increased to 65,000 men, in order to meet the then existing exigencies of the military service (*Sec.* 12). In addition to this, the President was authorized

> "to raise a *force* of not more than thirty-five thousand *volunteers* to be recruited as he may determine from the country at large or from the localities where their services are needed, without restriction as to citizenship or educational qualifications, and to organize the same into not more than twenty-seven regiments organized as are infantry regiments of war strength in the *regular army*, and three regiments to be composed of men of special qualifications in horsemanship to be organized as cavalry regiments for service mounted or dismounted."

It was provided that—

> "All enlistments for the *volunteer force herein authorized* shall be for the term of two years and four months, unless sooner discharged." (*Sec.* 12.)

The President was empowered to continue in service or to appoint brigadier and major-generals of volunteers, in addition to those of the regular army (*Sec.* 13); also to continue in service or appoint certain officers of the volunteer staff, including twelve assistant commissaries of subsistence with the rank of captain (*Sec.* 14).

It was provided—

> "That all volunteer staff officers herein authorized to be appointed or retained in the service shall be honorably discharged on July first, nineteen hundred and one, or sooner if their services are no longer required."

Also that all other volunteer officers and enlisted men should be mustered out of service and discharged in the manner provided by the act of April 22, 1898, and that on July 1, 1901, the army be restored to the basis which existed prior to April 1, 1898.

Also,

> "That enlisted men of volunteers who desire to remain in the military service, *either* in the *regular army* or the *temporary force authorized by this act*, may, if found qualified therefor, be transferred to and enlisted in such batteries, troops or companies as may be below the maximum authorized strength, and when so transferred and enlisted, shall be credited on their new enlistment with the periods of service rendered by them respectively as *volunteers*."

No other provisions of the act are pertinent to the issues in this case, except the one with reference to the employment of retired officers on certain active duty, in time of war (*Sec.* 7). Of this mention has already been made and we shall have occasion to refer to it later.

Neither the act, nor the order of the President did away with the volunteer force or consolidated it with the regulars. On the contrary, if it can be said that the War Department had any plausible reason for permitting regulars to try officers and men of the volunteer army, as organized under the act of 1898, no color of reason for such a course remained after the passage of the act of March 2, 1899. No language could make it plainer than that employed in the portions of the latter act which we have just quoted, that the volunteer force of 35,000 men, authorized, was intended to be like similar forces, previously organized, and to be entirely distinct from the permanent organization. It is wholly immaterial that the act spoke of the army of the United States as comprising

both forces, or that, under the provisions of the act, members of the volunteer force might be assigned to duty with regulars and, for the more efficient conduct of military operations, the permanent and the temporary organization should be more closely allied. It is enough that the temporary force continued to exist as a separate organization and that the significant term "volunteer" was applied to it.

Certain acts of the War Department show that the military authorities have not been consistent in treating volunteers as part and parcel of the same force as the regulars. In the "*Official Register of Officers of Volunteers in the Service of the United States, Organized under the Act of March* 2, 1899," a public executive document already referred to, which was published by order of the Secretary of War on January 1, 1900, we find a complete list of the officers, who were then serving in the volunteer force. At the same time a separate list of all officers serving in the permanent organization was preserved, and published as a separate document.

In General Orders, *No.* 41, *Headquarters of the Army*, issued on May 10, 1898, we find this language employed with respect to the equipment of the volunteer army, authorized for by the act of April 22, 1898:

> "In order that the volunteer *forces* now being organized may know what arms * * *"

In General Orders, *No.* 55, *Headquarters of the Army*, issued on May 26, 1898, volunteers were spoken of thus:

> "The *force* provided for in the second section of the aforequoted act of Congress * * *"

In General Orders, *No.* 73, *Headquarters of the Army*, issued on June 21, 1898, the Secretary of War spoke of

the troops comprising an army corps, which was made up in part of regulars and in part volunteers, as "*forces.*" The use of the plural number is significant.

In many other orders issued from the Headquarters of the Army the words "force" and "forces" are used interchangeably to describe a great variety of organizations such as the troops stationed in a particular locality, or those organized for a particular duty, or enlisted or organized under a particular act. This shows that the term has no well recognized and technical significance in military law, or among military men. In no instance other than that of the circular of June 30, 1898, have the military authorities attempted to give it a strained or narrow meaning. It is evident that this circular had its origin in the jealousy and dislike with which regulars have always regarded volunteers, and was a poorly concealed attempt to evade the requirements of the Article of War, and in this way to place volunteers at their mercy.

Another act of the War Department, which has already been considered in the preceding branch of this argument, has a direct bearing upon the present question. We have seen that several months before he ordered Deming's trial, General Shafter had reached the age when his retirement from active service became compulsory; he had been retired, but contrary to law was still assuming to perform active duty, in command of troops, and in time of peace. How the respondent will attempt to excuse this violation of law, we cannot see. His counsel are silent on the subject. They may argue that the commission which he held in the volunteer army gave his acts some sort of validity. If such an argument were sound, would it not follow of necessity that the volunteers constituted a force other than that of the regulars? It would be absurd to say that the act of 1899 (*Sec.* 7) made an officer forever in-

competent to perform certain duties under certain conditions, but a little jugglery and a change of his title would render him competent to perform the very same duties in the same force and under circumstances wholly identical.

The record before us contains no opinion of the court below and, strictly speaking, there was none which could be sent up to this court. The explanation of this is that when Deming filed his petition in September of 1901, the Circuit Court refused to grant a writ of *habeas corpus*. Deming took an appeal to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the decree of the Circuit Court and remanded the case, with the direction that the writ be granted and further proceedings in the cause be had in conformity with the law as stated in the opinion. To this opinion of the appellate court, delivered by Judge Sanborn, we respectfully refer this court. For the sake of convenience a copy of it is appended to this brief (*See "Appendix"*). On the question now under consideration it gives a clear and complete review of the pertinent statutes, and tracing the article of war to its origin, shows most conclusively that it was intended to protect officers like Deming from trial by regulars and that it has neither been repealed nor has its operation been curtailed.

We submit that the trial was a flagrant violation of the law. If the officers named in General Shafter's order had been authorized to proceed as a court-martial to try anybody, each and every of them was incompetent to try Deming. The acts of each one and of all, done in the course of the trial, were void. The sentence imposed upon Deming never had any validity or legal effect, and the same is necessarily true of all acts of the reviewing and executive authorities, which ensued it.

III.

The petitioner being imprisoned under the circumstances related, was entitled to seek and obtain his release by writ of habeas corpus.

In the case of *Dynes* v. *Hoover* (20 *Howd.* 65, 83), it was said:

> "With the sentences of courts-martial, which have been convened regularly, and have proceeded legally, by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil court have nothing to do, nor are they in any way alterable by them. * * * *But, we repeat, if a court-martial has no jurisdiction, over the subject-matter of the charge it has been convened to try or shall inflict a punishment forbidden by law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved, inquire into the want of the court's jurisdiction and give him redress.*"

It has never been denied that where a court-martial, without jurisdiction of the person or of the offense charged, proceeds with a trial and imposes a sentence resulting in the imprisonment of the accused, or where such sentence has been executed without first being approved and confirmed in the manner prescribed by law, it is a nullity and the accused has a remedy in the civil courts and may secure his release through *habeas corpus* proceedings. (*U. S.* v. *Runkle*, 122 *U. S.* 543; *Ex parte Reed*, 100 *U. S.* 13; *In re Siebold*, 100 *U. S.* 371; *In re Clarke*, 100 *U. S.* 399; *Ex parte Mason*, 105 *U. S.* 696;

Smith v. *Whitney*, 116 *U. S.* 167, 177, 179; *United States* v. *Grimley*, 137 *U. S.* 147; *Johnson* v. *Sayre*, 158 *U. S.* 109.)

Deming's failure to raise these objections, when arraigned, did not constitute the officers before whom he was brought, a court-martial, nor did it give the right to try him to any one of them, whom the law (*Art.* 77) forbade to do so. His right to question the validity of General Shafter's order, the existence of the court, its jurisdiction for the sole purpose of its creation, the validity of its sentence, and the legality of his imprisonment, was not waived. The proceedings in the court below were not, in any sense, in the nature of a writ of error. They were instituted for the purpose of preventing a further violation of the law.

In his opinion (*supra*), Judge Sanborn said:

> "*Neither the silence, the consent nor the agreement of the parties can confer it, if it is not granted by the statutes. This court-martial derived no power or jurisdiction from the acts of the Congress of the United States, because it was constituted in direct violation of and not in accordance with them. It was, therefore, entirely without jurisdiction to try the petitioner, and its judgment against him was absolutely void.*"

The Judge Advocate-General of the Army (*Dig. Opin. J. A. G.*, 591), said in one of his opinions:

> "Objections going to the legal constitution or composition of the court, or its jurisdiction, should properly be specially presented when the accused is first called upon to plead: *valid objections of this radical character, however, are not waived, if the accused instead of submitting a special plea, pleads over to the*

merits, since consent cannot confer jurisdiction where none exists."

We submit that the decree of the court below should be affirmed.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Appellee.

APPENDIX.

Opinion of the United States Circuit Court of Appeals, Eighth Circuit, in the case of PETER C. DEMING *on the petition of* JOHN H. ATWOOD, *appellant*, v. ROBERT W. MCCLAUGHRY, *Warden of the United States Penitentiary at Fort Leavenworth, Kansas.*

SANBORN, *J.*:

This is an appeal from an order of the Circuit Court which denied the petition of Peter C. Deming for a writ of *habeas corpus* upon this state of facts: Deming was, on March 29, 1900, a captain in the subsistence department in the volunteer army of the United States. On that day William R. Shafter, a major-general of the volunteer army, and a retired brigadier-general of the regular army of the United States, ordered that a general court-martial, composed entirely of officers of the regular army, should convene "for the trial of Captain Peter C. Deming, Assistant Commissary of Subsistance, U. S. Volunteers," upon some charge, and sentenced him to dismissal from the service of the United States and to confinement in the penitentiary for three years, and this sentence was approved by the Secretary of War and confirmed by the President of the United States. Deming is confined in the penitentiary at Leavenworth, Kansas, under a mittimus based on this judgment. He avers that the sentence upon him is void, and that he is illegally deprived of his liberty because General Shafter, a retired officer of the regular army, had no authority to

convene the court, and because the court-martial which condemned him was not reguarly constituted or organized in that it was composed entirely of officers of the regular army, who were expressly prohibited to hear or determine any charge against him, an officer of the volunteer army, under the 77th article of war (Rev. Stat. Sec. 1342) which reads: "Officers of the regular army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces except as provided in article seventy-eight."

Sanborn, Circuit Judge, after stating the case as above, delivered the opinion of the court:

The petitioner, Deming, was an officer of the volunteer force raised under the act of Congress of March 2, 1899. (30 Stat., c. 352, p. 977.) He was tried and convicted by a court-martial composed of officers of the regular army. The 77th article of war declares that officers of the regular army are not competent to sit on courts-martial to try the officers and soldiers of other forces. The crucial question in this case is: Was this volunteer army the same army as the regular army, or was it a different and supplemental army? Was this volunteer force raised under the act of 1899 the same force as the regular army or was it one of the "other forces" of the United States within the intent and meaning of article 77? On a cursory reading of the article the question does not seem to be difficult nor the true answer to it doubtful. And were it not for the earnest and forceful presentation of their view by the learned counsel for the Government and for the fact that the general commanding the army under the advice of the Judge Advocate General has held that under the acts of April 22, 1898 (30 Stat., c. 187, p. 361), and on March 2, 1899 (30 Stat., c. 352, p. 977), the volunteer force is the same force as the regular army, and that the

officers of the latter may lawfully try the officers of the former (Circular 21, H. Q. A., June 30, 1898), that contention might not seem forceful. But the opinions of the officers of the executive department of a government relative to the construction of a statute whose execution has been entrusted to them justly command, and should receive the careful consideration of the courts, and in doubtful cases they should be permitted to lead the way to their decision. Their opinions ought not to be overruled or disregarded unless upon a deliberate and careful review of the decisions which they render it clearly appears that they are tainted with error.

On the other hand, the decisions of these officers are not controlling or conclusive upon the courts. It is the function and duty of the judicial department of the Government to construe its statutes and to declare their meaning. That duty the courts may not renounce or abandon to others in its discharge; they must exercise their own independent judgment guided only by the established principles of law and the recognized canons of interpretation. While the opinions of the officers of the executive department of the Government may be permitted to lead the way to the proper construction of ambiguous statutes entrusted to them to enforce, yet where the words of the acts are plain and their meaning is clear, these must prevail. (Hartman *v.* Warren, 76 Fed. 157, 162; 22 C. C. A. 30, 36; 40 U. S. App. 331, 342; Webster *v.* Luther, 163 U. S. 331, 342; U. S. *v.* Tanner, 147 U. S. 661, 663; Merrit *v.* Cameron, 137 U. S. 542; U. S. *v.* Graham, 110 U. S. 219; Swift Co. *v.* U. S. 105 U. S. 691.)

Guided by these familiar and indisputable rules of law the question whether the volunteer force raised under the act of 1899 was the same force as the regular army or any of the "other forces" of the United States within the meaning of article 77 will be considered.

The article reads: "Officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces except as provided in article 78." The exception in article 78 relates to the officers of the marine corps and does not withdraw the appellant or the officers who tried him from the prohibition of the general rule announced in article 77.

The provisions of the act of March 2, 1899, pertinent to the issue under consideration are these:

"That from and after the date of the approval of this act the army of the United States shall consist of * * * ten regiments of cavalry, seven regiments of artillery, twenty-five regiments of infantry," and appropriate officers, departments and corps. (30 Stat., c. 352, p. 977.)

"That to meet the present exigencies of the military service, the President is hereby authorized to maintain the regular army at a strength of not exceeding sixty-five thousand enlisted men, to be distributed amongst the various branches of the service, including the signal corps, according to the needs of each, and raise a force of not more than thirty-five thousand volunteers to be recruited as he may determine from the country at large, or from the localities where their services are needed, without restriction as to citizenship or educational qualifications, and to organize the same into no more than twenty-seven regiments organized as are infantry regiments of war strength in the regular army, and three regiments composed of men of special qualifications and horsemanship and marksmanship to be organized as cavalry for service mounted or dismounted—*provided*, that such increased regular and volunteer force shall continue in service only during the necessity therefor, and not later than July 1, 1901. All enlistments for the volunteer force herein authorized shall be for the term of two years and four months unless sooner discharged." (Sec. 12.)

That the President shall have power to continue in service or to appoint by and with the advice of the Senate certain brigadier generals of volunteers and major-generals of volunteers, "*provided*, that regular army officers continued or appointed as general officers or as field or staff officers of volunteers under the provisions of this act shall not vacate their regular army commissions." (Sec. 13.)

That the President is authorized to appoint with the advice and consent of the Senate, officers of the volunteer staff, including twelve assistant commissaries of subsistence with the rank of captains. (Sec. 14.)

That the officers and enlisted men of the volunteer army shall be mustered out of the military service of the United States and discharged as provided in the act of April 22, 1898, provided, that enlisted men of volunteers who desire to remain in the military service may be transferred to, and enlisted in the regular army. (Sec. 15.)

It will not be unprofitable to briefly call to mind the course of the legislation, decision, and practice of the nation relative to the matter in hand prior to 1899 before entering upon the discussion of the question which that act and the 77th Article of War present. The American articles of war of 1776 provided that "the officers and soldiers of any troops, whether minute men, militia or others," should, when joined with the regular forces, be subject to be tried by courts-martial, in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender." Davis' Military Law, p. 617, Section 6 of the act of May 2, 1792, reads in this way: "And be it further enacted, that courts-martial for the trial of militia shall be composed of militia officers only." (1 Stat., c. 28, p. 264). This provision was re-enacted in the act of Feb-

ruary 28, 1795 (1 Stat., c. 36, p. 424). In the act of April 18, 1814 (3 Stat., c. 82, p. 134), and in the act of July 29, 1861 (12 Stat., c. 25, Sec. 5, p. 282). From these acts it will be seen how uniformly the legislation and practice of the nation excluded the officers of the regular army from courts-martial to try the officers and soldiers of the militia. Not only this, but the act of April 10, 1806, which establishes the rules for the government of the armies of the United States contained in this article.

"Article 97. The officers and soldiers of any troops, whether militia or others, being mustered and in the pay the United States, shall, at all times and in all places, when joined, or acting in the conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers of the regular forces, save only that such courts-martial shall be composed entirely of militia officers only." The fact will not be overlooked that under this article the officers of the regular forces were disqualified from trying the officers and soldiers of troops joined or acting in conjunction with the regular army, whether such troops were militia, volunteers, or others. This enactment remained unchanged until in 1874, the present article 77 took its place (Rev. Stat., p. 237; 18 Stat., c. 333, p. 113). During all this time the nation maintained a regular army, and from time to time the President was empowered by Congress to raise volunteer forces to augment the strength of the regular force. Congress provided for the enlistment of volunteers in 1812, for the war with Great Britain (2 Stat., c. 21, p. 676). In 1836, for the Seminole war (5 Stat., c. 80, p. 32). In 1839, to protect the Maine boundary (5 Stat., c. 89, p. 355). In 1846, for the war with Mexico (9 Stat., c. 16, p. 9), and in 1861, for

the War of the Rebellion (12 Stat., c. 9, p. 268; c. 17, p. 274). No opinion of any court, or of any officer of the War Department, rendered prior to June 27, 1898, to the effect that any of these volunteer forces was the same force as the regular army, or to the effect that the officers of the latter were competent to sit on courts-martial to try the officers of the former, either under the old article 97, or the present article 77, has been called to our attention. On November 19, 1863, Judge Advocate General Holt declared that "The words 'militia officers,' as employed in the 97th Article of War, have been interpreted since the commencement of the Rebellion as synonymous, so far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the articles, and in its practical enforcement the object of the rule is accomplished. In the practice of the Department the officers of the regular army were not permitted to sit on courts-martial to try the officers or soldiers of the volunteer force. G. O. 53, Dept. East, 1864; G. O. 16, Dept. Missouri, 1864; G. C. M. O. 11, 13, 16, Dept. Kentucky, 1865. The unanimous opinion of the writers upon military law was that the volunteer army was one of the "other forces" than the regular army, and that the officers of the latter were prohibited from sitting on courts-martial to try the officers or soldiers of the former. Benét on Military Law (Ed. 1866), p. 25; Winthrop's Abridgment of Military Law, 29; Winthrop's Military Law and Precedents (2d Ed.), 92; Davis' Military Law, pp. 27, 496. The decisions of the courts had recognized the two forces as different, the one as temporary, called forth by the exigency of the time, to serve during the war or its imminence, and then to be dissolved into its original elements, the other as permanent and perpetual, to be maintained in peace and in war. U. S. *v.* Sweeney,

157 U. S. 281; U. S. *v.* Merrill, 9 Wall. 614; Kerr *v.* Jones, 19 Ind. 351; Wantlan *v.* White, 19 Ind. 470. The laws of the long-continued practice of a people evidence its public policy. Vidal *v.* Girard's Ex'rs, 2 How. 127, 197; U. S. *v.* Trans-Missouri Freight Association, 58 Fed. 58, 69, 7 C. C. A. 15, 13, 19, U. S. App. 36, 34. The uniform course of legislation, decision and practice upon the subject under consideration for more than a century established the fact that it had become the public policy of the United States to prohibit the trial of the officers and soldiers of the volunteer force and of the militia by the officers of the regular army.

Nor is the reason for this legislation and action far to seek or difficult to discern. It was not, as suggested by counsel for the Government, that the volunteers and militia were citizens of the States and that their officers were generally commissioned by the governors. It lies deeper and is more fundamental and potential. It is grounded in that cardinal principle of Anglo-Saxon jurisprudence that no man shall be tried or condemned save by the hearing and judgment of his peers; in that principle which inspired the rule that deprives judges of the power to try persons accused of heinous crimes in civil life and remits their trial to forum of their peers, the jury.

The officers of the regular army are generally taught in their youth the laws that govern the regular force, that high regard for truth and honor, and that prompt and exact obedience to orders which condition its high efficiency. The officers of the volunteers spend their earlier days without knowledge of military law preparing for agricultural, mechanical, mercantile or professional pursuits, unaccustomed to military discipline and exempt from the controlling commands of superiors. The officers of the regular army make the discipline of that army, the

preparation for war and war itself. The work of their lives, their hopes and their aspirations are to excel in this their chosen profession, and upon it they rely for their livelihood. The officers of the volunteers look to civil pursuits for their ultimate success and sustenance. They leave these pursuits for a few short months at the call of their country to subdue a rebellion against, or to defeat the enemy of their nation. They seek not so much to discipline the army they join and to prepare it for war as to speedily conclude the war, restore peace and return to their chosen pursuits. Their hopes and aspirations center not in their temporary occupation, but in the pursuits they have left and to which they are soon to return. More than all this the officers of the regular army know the unwritten code of military thought and action, the habit of the trained soldier's life and know them so well that their practice is involuntary, while a neglect of them seems inexcusable. The officers of the volunteer force come to the army in ignorance of this code and custom. They have short time to learn or to practice them, their invariable practice does not always seem to them essential to the defeat of the enemy and a speedy peace, and the heinousness of a disregard of some of them does not always impress them. So it is that the thoughts, actions, habits and ambitions of the officers of the regular army differ widely from those of the volunteers. Many things in the life of the soldier seem vital to the former that have small importance in the eye of the latter. Many military offenses seem heinous to the former that appear venal to the latter. Congressmen have not been ignorant of these facts. They have associated with, known and honored the officers of the regular army. They have known their pride in their profession, in the efficiency of their regular force and the abhor-

rence with which they have looked upon any breach of either the moral or the military law. They have known the volunteers. These have been their constituents and their friends. Many of the members of Congress have been volunteers themselves. In the light of these facts and with this knowledge they have thought that the officers and soldiers of the volunteer force ought not to be tried by the officers of the regular army. And they have made and maintained the legislation which has been quoted for more than a century to carry that thought into effect. This, then, was the situation when the act of April 22, 1898, under which a judge-advocate general first held that officers of the regular army could lawfully sit on courts-martial to try the officers and soldiers of the volunteer force, was passed. The acts of Congress had prohibited for nearly a century and still expressly forbade it. The decisions and the practice of the officers of the War Department interdicted it. The established policy of the nation inhibited it. In the light of this legislation, decision and policy, the acts of 1898 and 1899 must be read and construed. What was there in these facts to repeal the statutory inhibition and reverse the public policy of a century? The decisions, the policy and the practice rested on the acts of Congress, and certainly nothing less than an expressed repeal by that body of the plain inhibition of article 77, or such legislation as clearly shows the undoubted intention of Congress to strike it down, ought to be permitted to withdraw it and to reverse the policy and practice of so many years.

The first argument in support of the contention of the Government that the acts of 1898 and 1899 have had this radical effect is that while the volunteer army was one of the "other forces" than the regular army under article

77, prior to the act of 1898, that act made it the same force as the regular army, because it provides that the organized and acting land forces of the United States shall consist of the Army of the United States, and of the militia of the several States when called into the service of the nation, and the regular army is the permanent military establishment which is maintained in peace and in war, and that the volunteer army is maintained only during the existence of war or while war is imminent, and is raised and organized only after Congress authorizes the President so to do (30 Stat., c. 187, Secs. 2, 3, and 4, p. 361). They insist that this enactment declares that there were but two forces of the United States, the army and the militia, and that, as the regular army was one part of the former force, and the volunteer army was another part of the same force, the latter army could not, after this enactment, be one of the "other forces" than the regular army under article 77. There are several reasons why this argument fails to convince. In the first place there is no repeal, notification or reference to the provisions of article 77, in this act or in the act of 1899. There is nothing in either of them to indicate that in considering or enacting this legislation Congress intended to modify the terms or the effect of that article, and as no such intention appears in the legislation the conclusive presumption is that no such intention existed. Moreover, the care and emphasis with which the difference between the regular army and the volunteer army is maintained throughout the act of 1898, demonstrate the fact that it was the positive intention of Congress to maintain the distinction between the two forces. Starting with the declaration that the active land forces shall consist of the army and the militia, that the regular army is the permanent military establishment and the volunteer army is the tempor-

ary force in which enlistments shall be for a term of two years unless sooner terminated, it contains these significan provisions:

"SEC. 5. That when it becomes necessary to raise a volunteer army the President shall issue his proclamation stating the number of men desired. * * *"

"SEC. 6. That the Volunteer Army and the militia of the States when called into the service of the United States shall be organized under, and shall be subject to, the laws, orders and regulations governing the Regular Army. * * *"

"SEC. 7. That all organizations of the Volunteer Army shall be so recruited from time to time as to maintain them as near to their maximum strength as the President may deem necessary. * * *"

"SEC. 8. That all returns and muster rolls of the volunteer army 'shall be rendered to the Adjutant-General of the army and filed in the record and pension office of the War Department.'"

"Sec. 9. That in time of war, or when war is imminent, the troops in the service of the United States, whether belonging to the Regular or Volunteer Army or to the militia, shall be organized into divisions of three brigades."

Sec. 10 relates to staff officers.

"Sec. 11. That the President is hereby authorized to appoint in the Volunteer Army 'one major-general for each army corps or division and one brigadier-general for each brigade,' and any officer so selected and appointed from the regular army shall be entitled to retain his rank therein."

"Sec. 12. That all officers and enlisted men of the volunteer army and of the militia of the States, when in the service of the United States, shall be in all respects on the same footing as to pay, allowances, and pensions as

that of officers and enlisted men of corresponding grades in the regular army."

"Sec. 13. That the governor of any State or Territory may, with the consent of the President, appoint officers of the regular army in the grades of field officers in organizations of the Volunteer Army, and officers thus appointed shall be entitled to retain their rank in the Regular Army. * * *"

"Sec. 14. That the general commanding a separate department or a detached army is authorized to appoint from time to time military boards of not less than three or more than five volunteer officers of the Volunteer Army to examine into the capacity, qualifications, conduct, and efficiency of any commissioned officer of said army within his command. * * *"

These various sections are utterly inconsistent with the view that the volunteer army was made the same force as the regular army, and that all distinctions in the treatment and trial of the members of the two forces were stricken down by the casual enumeration of the active land forces of the nation in the first section of the act. If the volunteer army was the regular army why the declaration in section 6 that the volunteer army should be subject to the laws, orders and regulations governing the regular army, in section 12, that the officers and enlisted men of the volunteer army should be on the same footing as men of corresponding grades of the regular army, and in section 13 that officers of the regular army commissioned as officers in the volunteer army should retain their rank in the former? These provisions are pregnant with significance. But section 14 places the purpose and intention of the law makers to maintain the established rule that the volunteer army was one of the "other forces" than the regular army within the meaning of article 77, and the law and the policy that

their officers and soldiers should not be tried by the officers of the regular army, beyond doubt or cavil. It provides for military boards to examine into the capacity, qualifications, conduct and efficiency of officers of the volunteer army. But in accordance with the then existing law and policy of the nation it excludes from these boards all officers of the regular army and directs that they shall be composed entirely of officers of the volunteer force. When the entire act of 1898 is carefully read and considered it is found to contain no indication of any intention on the part of Congress to modify the terms or the settled construction of article 77. On the other hand, it evidences a plain purpose to maintain the rule and policy which classified the volunteer army among the "other forces" than the regular army, and prohibited the officers of the latter force from sitting on courts-martial to try the officers and soldiers of the former.

Another reason why the argument based upon the classification in the first section of this act is not persuasive is that it is fallacious. Stated in syllogistic form it is: the land forces are composed of the army and the militia. The army is composed of the regular army and the volunteer army. Therefore the volunteer force is the regular force. When thus stated the fallacy is apparent. The contention is based on the false assumption that every part of a military force is the same part as every other part. That every species of a genus is the same as every other species of that genus; that every class properly described by a generic term is the same class as every other class covered by that term. Illustrations make the fallacy plain. Oranges and apples are fruit, yet oranges are other fruit than apples. The Russians and Americans are people, and yet the white Americans are other people than the black Americans. The cavalry, infantry and artillery

of the regular army is a military force, and yet the cavalry and infantry are other forces than the artillery. So the regular army, and the volunteer army under the classification of 1898 constitute a force, and yet the volunteer army both in fact and within the meaning of article 77 is another force than the regular army.

Again, even if the contention of counsel for the Government were conceded, it would but serve to strengthen the position that the petitioner, who was commissioned under the act of 1899, was a member of other forces than the regular army. The argument rests entirely on the declaration of the act of 1898 that the Army of the United States is composed of the regular army and the volunteer army, and that the land forces consist of the army and the militia. The act of 1899 contains no such classification, but on the other hand expressly declares that the "Army of the United States shall consist" of the cavalry, infantry and artillery of the regular army; that the regular army may be temporarily increased to 65,000 men, and that the President may "raise a force of not more than thirty-five thousand volunteers" (30 Stat., c. 352, Secs. 1, 12, pp. 977, 979). The petitioner is one of these volunteers, and if the effect of the classification of 1898 had been all that counsel claims, yet by the literal terms of the act of 1899, Deming was a member of another force than the regular army—a member of the volunteer force.

Counsel for the Government advance another argument in support of the contention that the volunteers under the acts of 1898 and 1899 were not other forces than the regular army. It is that the law and the practice upon this subject during the War of the Rebellion were established to prevent State troops from being tried by officers of the regular army; that the volunteers during that war were raised by the States and officered by their governors,

and that their regiments were designated by the names of the States from which they came, while the volunteers called under the acts of 1898 and 1899 were raised under a different system, were not so nearly assimilated to the militia, and that those received under the act of 1899 were not apportioned to or raised by the States, their regiments were not designated by the names of the States, but like the regulars they were enlisted from the country at large; their regiments took numbers supplemental to those of the regiments of the regular army and their officers were appointed not by the governors but by the President.

This contention, in our opinion, is based on a misconception of the real reasons which inspired the legislation and the policy which, for so many years, has prohibited the trial of volunteers by regulars. That reason was not that the volunteers were State troops, and the regulars national troops, that the volunteers were raised by the States and their officers were appointed by the governors, while the regulars were raised by the nation, and their officers were commissioned by the President. It was, as has been shown in an earlier part of this opinion, that the knowledge, training, habits, hopes, and ambitions of the officers of the regular army, who had devoted themselves for life to the discipline and efficiency of that force, necessarily conditioned their opinions of the heinousness of military offenses, and these opinions, this knowledge and training, these hopes and ambitions differed so widely from those of the officers of the volunteer force, who came from civil life for a limited time, ignorant of military law and of the customs and practices of a soldier's life, and anxious to speedily return to their civil occupations, that Congress established the rule that the former should not be competent to sit on courts-martial for the trial of the

latter. The reason of this rule applies to the volunteer force raised under the act of 1899 with as much force as to those raised during the War of the Rebellion.

Finally, it is contended that the provisions of section 6 of the act of April 22, 1898, "that the Volunteer Army and the militia of the States, when called into the service of the United States, shall be organized under, and shall be subject to, the laws, orders, and regulations governing the Regular Army," indicates that the volunteer army and the militia are a part of the regular army, and hence the same force as that army within the meaning of article 77. The enactment appears to us to demonstrate the contrary, and that because if the volunteers and the militia were a part of the regular army they were subject to the laws, orders, and regulations governing it, without a special declaration to that effect. A similar provision may be found in the act of July 22, 1861 (12 Stat., c. 9, Sec. 2, p. 269), under which the volunteer forces for the War of the Rebellion were enlisted, and yet those volunteers were held to be other forces than the regular army.

The result is that when the acts of 1898 and 1899 were passed there was an article of war in force enacted by Congress which expressly prohibited the officers of the regular army from sitting on courts-martial to try the officers or soldiers of other forces. Prior to the passage of these acts the volunteer force was in fact and had b en uniformly held to be one of these other forces, so that in law and in practice this article of war forbade the officers of the regular army to try the officers or soldiers of the volunteers. There is no express repeal or modification of this inhibition in the acts of 1898 and 1899. There is nothing in these acts repugnant to or inconsistent with the prohibition, nothing to show that Congress intended thereby to withdraw or to change it, but strong indica-

tions, in the marked distinction it studiously maintained between the regular army and the volunteer army, and in the fact that it provided for military boards composed entirely of officers of the volunteer army to examine into the efficiency and qualifications of the volunteer officers, that it intended to preserve and to maintain the inhibition. The reason which inspired this legislation and the policy and practice it evidences applies with all its cogency and force to the officers and soldiers of the volunteer force raised under the act of 1899. These facts and the consideration to which we have adverted have irresistibly forced our minds to the conclusion that the volunteer force raised under the act of 1899 was not the same force as the regular army, but that it was one of the "other forces" specified in article 77, and that the officers of the regular army were prohibited by that article to sit on any court-martial to try the petitioner who was an officer of the volunteer force raised under the act of 1899.

It is insisted, however, that if the members of this court-martial were disqualified to try the petitioner, that objection was waived because not made at the trial, and that the judgment was not void, but merely erroneous and voidable, so that it was impregnable to collateral attack by the writ of *habeas corpus*. A writ of *habeas corpus* cannot be made to perform the office of a writ of error, but it is the proper process to challenge a void judgment and to relieve the defendant from its baleful effect. It may not be invoked to review and avoid an erroneous judgment, of which the court had jurisdiction, but it is always effective to relieve a prisoner from the restraint imposed by a judgment that is absolutely void. *In re* Reese, 107 Fed. 942, 948; *In re* Buskirk, 72 Fed. 14, 21, C. C. A. 410, 417; 25 U. S. App. 613, 615; *Ex-parte* Ayers, 123 U. S. 443; *Ex-parte* Fisk, 113 U. S. 713, 718;

Dynes *v.* Hoover, 61 U. S. 81, 83; *Ex-parte* Reed, 100 U. S. 13, 23; *In re* Coy, 127 U. S. 731; *Ex-parte* Yarbough, 110 U. S. 651; U. S. *v.* Pridgeon, 153 U. S. 48, 59; Rose *v.* Roberts, 99 Fed. 948; 40 C. C. A. 199. A judgment or sentence of a court which had no jurisdiction on the subject-matter or of the person affected by its adjudication is absolutely void. But the judgment or sentence of a court empowered to hear and determine the issues relative to the subject-matter and the person affected by its decision, although it may be wrong and irregular, is simply voidable and cannot be successfully attacked collaterally. Foltz *v.* St. Louis and S. F. Ry. Co., 60 Fed. 316, 318; 8 C. C. A. 635, 637; 19 U. S. App. 576, 581. Hence the question here presented is, did this court-martial have jurisdiction to hear and try the petitioner for the offence of which he was charged? The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudications which they render and that their judgments are valid. But no such presumption accompanies the sentence of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown.

A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. The articles of war specify the officers who are empowered to convene the courts (articles 72, 73, 74, 81, 82), the officers who may compose them (articles 75, 76, 77, 78, 80), and the persons and charges which they are empowered to try (articles 77, 78, 80, 81, 82, 83), it necessarily follows that the jurisdiction of every court-martial, and hence the

validity of its judgments, is conditioned by these indispensable prerequisites: (1) that it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were those whom he was authorized by the articles of war to detail for that purpose; (3) that the court thus constituted was invested by the acts of Congress with power to try the person and the offence charged, and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial *coram non judice* and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction. Runkle *v.* United States, 122 U. S. 543, 546; Mills *v.* Martin, 19 Johns. 7, 30; Wise *v.* Withers, 3 Cranch, 331; *Ex-parte* Watkins, 3 Pet. 193, 207; Dynes *v.* Hoover, 20 How. 65, 80.

Let us now measure the contention that the judgment of this court-martial which condemned the petitioner to dismissal and imprisonment was not void, but was merely irregular and erroneous by these indisputable principles. The 88th article of war reads: "Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof and shall not receive a challenge to more than one member at a time." The acts of Congress make no provision for a challenge to the array, and point out no method whereby the question of their disqualification of all the members may be determined in the first instance by any one but the members of the court themselves challenged one by one.

It is said that a court-martial is like a jury, that the reviewing officer occupies the place of a judge, that the disqualification of a juror, if not suggested at the trial, is

waived and does not render the verdict void (Kohl *v.* Lehlback, 160 U. S. 293; Clark *v.* Van Vracken, 20 Barb. 281, 6 Opin. Atty. Gen. 206), and that the judgment of this court-martial ought not to be held void because all its members were incompetent to sit upon it. But in the essentials of the issue that analogy does not hold. The question of the qualification of triers arises *in limine*. It is to be determined before the trial commences. In the case of a trial by a jury, the judge, not the jury, determine the qualifications of the jurors, while in a trial by a court-martial the members of the court must determine their own qualifications, and if all the members are incompetent to sit in the court at all, how can they be competent to decide that they are either competent or incompetent to act there? Moreover, a jury decides nothing but the questions of fact, while the members of a court-martial determine both the law and the facts. The argument is not persuasive. Indeed the analogy between the judgment of a court-martial and the judgments of courts composed of disqualified judges is much closer. All the members of this court-martial were disqualified. It was a court of inferior or limited jurisdiction. Why should its judgment have more virtue than those of courts of general jurisdiction, some of whose judges are incompetent to sit? Yet the rule, generally supported by the great weight of authority, is that the judgments of such courts are void, and that neither waiver nor consent can give them validity. Case *v.* Hoffman, 100 Wis. 314, 356; Oakley *v.* Aspinwall, 3 N. Y. 547, 552; Low *v.* Rice, 8 Johns. 409; Clayton *v.* Per Dun, 13 Johns. 218; Edwards *v.* Russell, 21 Wend. 63; People *v.* Connor, 142 N. Y. 130, 133; Chambers *v.* Clearwater, 1 Keyes (N. Y.), 310; Sigourney *v.* Sibley, 21 Pick. 101, 106; Gay *v.* Minot, 3 Cush. 352; Hall *v.* Thayer, 105 Mass. 219, 224; Chicago

& Atlantic Ry. Co. *v.* Summers, 113 Ind. 10, 17; Ochus *v.* Sheldon, 13 Fla. 138; Chamber *v.* Hodges, 23 Tex. 112; Gains *v.* Barr, 60 Tex. 676, 678; Templeton *v.* Giddings, 12 S. W. (Tex.), 851.

The insuperable objection, however, to the jurisdiction of this court-martial and to the validity of its sentence is that the officer who called it was not only unauthorized but was positively prohibited by act of Congress to constitute it of the officers of the regular army, to detail these officers to sit upon it, and when these officers were so detailed they were in like manner prohibited from responding to the call and from becoming members of the court. The order convening the court-martial declared that the purpose of its call was "for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers," and it commanded nine officers of the regular army to meet and sit upon the court. The 77th article of war prohibited General Shafter, who issued this order, from directing these officers to sit upon a court-martial to try this officer of the volunteer force, and forbade them to do so. The court was therefore illegally constituted. It did not have a single member upon it that that commanding officer had the power to direct to participate in the trial of the petitioner, or that could lawfully so do. "It was necessary to show that the court was legally constituted in order to gain the jurisdiction of the person and offenses of those who were to be tried before it." Mills *v.* Maryin, 19 Johns. 33. "To give effect to its sentence it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law." Runkle *v.* United States, 122 U. S. 556. In the Army of the United

States courts-martial derive their power, their jurisdiction from the acts of Congress. Neither the silence, the consent nor the agreement of the parties can confer it if it is not granted by statutes. This court-martial derived no power or jurisdiction from the acts of Congress of the United States, because it was constituted in direct violation of and not in accordance with them. It was therefore entirely without jurisdiction to try the petitioner, and its judgment against him was absolutely void.

The judgment below must accordingly be reversed, and the case must be remanded to the Circuit Court with directions to issue a writ of *habeas corpus* and to proceed in accordance with the views expressed in this opinion, and it is so ordered.

Supreme Court of the United States.

No. 610.—October Term, 1901.

R. W. McClaughry, as Warden of the United States Penitentiary at Fort Leavenworth, Kansas, Appellant, *vs.* Peter C. Deming. } Appeal from the Circuit Court of the United States for the District of Kansas.

[May 19, 1902.]

A petition for a writ of *habeas corpus* was presented to the Circuit Court of the United States for the District of Kansas, First Division, asking that Peter C. Deming, once a captain in the subsistence department of the Volunteer Army of the United States, might be produced by Robert W. McClaughry, the appellant herein, in whose custody Deming was placed, McClaughry being the warden of the United States prison at Fort Leavenworth, Kansas.

On the part of Deming it was shown in the petition that he was imprisoned and restrained by virtue of a sentence imposed upon him by a general court-martial of the United States, convened at the Presidio of San Francisco, California, by William R. Shafter, Major General, United States Volunteers, and Brigadier General of the United States Army, retired, being of the age of 64 years. The sentence imposed upon Deming by the court-martial was that he should be dismissed from the service of the United States, and be confined in such penitentiary as the reviewing authority might direct for the period of three years, and that the crime, punishment, name and place of abode of the accused should be published in the newspapers in and about the city of San Francisco, and in the State where the accused usually resided. The sentence was approved by the Secretary of War and affirmed by the President of the United States on June 8, 1900.

The petition further showed that the court-martial which imposed the sentence was convened by virtue of the following order:

"Special Orders, No. 65. } Headquarters Department of California, San Francisco, Cal., March 29, 1900.

"7. A general court-martial is appointed to meet at the Presidio of San Francisco, California, at 11 o'clock A. M., on Tuesday, the 3d proximo, or as soon thereafter as practicable, for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers.

"Detail for the court:
"Colonel Jacob B. Rawles, 3rd Artillery.
"Lieutenant Colonel Richard I. Eskridge, 23rd Infantry.
"Major Louis H. Rucker, 6th Cavalry.
"Major Benjamin C. Lockwood, 21st Infantry.
"Captain Frank West, 6th Cavalry.
"Captain Carber Howland, 4th Infantry.
"Captain Sedgwick Pratt, 3rd Artillery.
"Captain Henry C. Danes, 3rd Artillery.
"Captain Charles A. Bennett, 3rd Artillery.
"Major Stephen W. Groesbeck, judge advocate, U. S. Army, judge advocate.
[SEAL.]

"The court is empowered to proceed with the business before it with any number of members present not less than the minimum prescribed by law, the above being the greatest number that can be convened without manifest injury to the service.

"Such journeys as Colonel Rawles, Major Groesbeck, and Captain Pratt may be required to make between their respective stations and the Presidio of San Francisco, in attending the meetings of the court, are necessary for the public service.

"By command of Major General Shafter:

"J. B. BABCOCK,
"*Assistant Adjutant General.*"

It was further shown in the petition that Deming was an officer in the Volunteer Army and forces of the United States, and that the members of the court-martial above named, and who tried him, were all officers in the Regular Army, and it was averred that he could not legally or lawfully be tried by a court-martial composed of such officers, because it would be in direct violation of the seventy-seventh article of war, section 1342, Revised Statutes of the United States, which reads as follows:

"Article 77. Officers of the Regular Army shall not be competent to sit on courts-martial, to try the officers or soldiers of other forces, except as provided in article 78."

"Article 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of an offender belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present, and duly authorized, shall be obeyed."

It was further averred in the petition that Deming was tried and convicted without due process of law and in violation of the Fifth Amendment of the Constitution of the United States; that the court-martial was an illegal one and without warrant of law, and the sentence imposed upon Deming was without warrant or authority of law, illegal and void. A writ of *habeas corpus* was prayed for, to be directed to the warden, commanding him to have the body of Deming before the court. This petition was sworn to in behalf of Deming by the petitioner J. H. Atwood.

Upon that petition the writ issued, and the warden, in compliance therewith produced Deming and made return to the writ in substance, as follows: That William R. Shafter was a major general of volunteers, exercising command of the Department of California, by virtue of an assignment of the President of the United States, as Commander-in-Chief of the Army; that on March 29, 1900, pursuant to authority and in conformity with the provisions of article 72 of the articles of war, General Shafter appointed a general court-martial, by special orders, to meet at the Presidio of San Francisco on April 3, 1900, or as soon thereafter as practicable, for the trial of Peter C. Deming, assistant commissary of subsistence, United States Volunteers, the detail of which court-martial was then stated, and which was the same as that already mentioned in the order convening the court. It was admitted that all the members of the court-martial so detailed were members of the Regular Army; that on April 5, 1900, the court proceeded to the trial of Deming, who, being present in court, the order convening the court was read to him, and he was asked if he objected to being tried by any member present named in the order convening the court, to which he replied in the negative. The members of the court and the judge advocate were then duly sworn, the court adjourning to meet again on April 23, 1900, at which time all the members of the court were present, and the judge advocate and Deming, the accused, with counsel. The accused was then arraigned upon charges of embezzling public money of the United States in violation of the sixtieth article of war, and conduct unbecoming an officer and a gentleman in violation of the sixty-first article of war; that thereupon Deming pleaded guilty, and the court-martial then passed sentence upon him, which was set forth in the return, and has been already stated.

The return further stated that on May 2, 1900, the proceedings, findings and sentence of the court-martial were approved by Major-General Shafter, and submitted for the action of the President pursuant to the provisions of article 106 of the articles of war, and that thereafter on June 8, 1900, the sentence was confirmed by the President of the United States, and on that day, by direction of the Secretary of War, Deming ceased to be an officer of the Army of the United States, and the penitentiary at Fort Leavenworth, Kansas, was designated as the place for his confinement.

A certified copy of the record and proceedings of the court-martial, duly authenticated under the laws of the United States, together with a copy of the order for the court-martial, the proceedings, finding and sentence in the case, were attached to the return of the warden, and made a part of it.

The facts above detailed also appear in the record of the court-martial.

The petitioner demurred to the return as not stating facts sufficient to warrant the detention of the petitioner in custody, nor to warrant the re-

fusal of the writ of *habeas corpus*, prayed for in the petition, and because such facts did not give the warden any legal right to deprive Deming of his liberty.

Although it does not appear distinctly in the record, yet it is conceded that upon the argument before the District Judge the writ was discharged and the prisoner remanded to the custody of the warden, and that upon appeal to the Circuit Court of Appeals that court reversed the order of the Circuit Court, and directed that the writ issue and that Deming be discharged from custody. Thereafter, in accordance with the judgment of the Circuit Court of Appeals, Deming was discharged by the Circuit Court, and from the order of the court so discharging him the government has appealed to this court.

Mr. Justice PECKHAM, after stating the foregoing facts, delivered the opinion of the Court.

The grave question in this case relates to the power of an officer convening a court-martial for the trial of an officer of volunteers, to compose that court entirely of officers of the Regular Army. It is claimed on the part of the respondent herein that a volunteer officer could not be legally tried by such a court, and that to convene and constitute a court-martial so composed, for the trial of a volunteer officer, was a violation of the seventy-seventh article of war, above set forth.

The Circuit Court of Appeals for the Eighth Circuit held, in a very clear and satisfactory opinion, (113 Fed. Rep. 639,) that the trial of Deming by a court-martial, all the members of which were officers of the Regular Army, was illegal, and that the objection could be taken on *habeas corpus*. The reasoning of the opinion leaves little to add further than to state our concurrence therein. As the case is one of considerable importance in its results, it is, however, proper that we should ourselves state the reasons which lead us to the conclusion that the order appealed from was right, and should be affirmed.

The government seeks a review of the decision of the court below, upon the strength of three propositions, argued by its counsel, upon one or all of which a reversal of the decision of that court is sought. These propositions are as follows:

(1) That the Volunteer Army of 1899, of which Deming was an officer at the time of his trial, conviction and sentence, was not "other forces" within the meaning of article 77 of the articles of war.

(2) That even if Deming were to be treated as an officer of "other forces" within the meaning of that article, the fact would not deprive the court-martial of regular officers who tried him, of jurisdiction; this article relating entirely to the competency of members of a court-martial, not at all to its jurisdiction.

(3) The court-martial having jurisdiction and acting within its powers, its proceedings cannot be assailed by *habeas corpus*.

Taking these propositions in the order named, we are brought to the consideration of the meaning and application of the seventy-seventh article of section 1342 of the Revised Statutes of the United States, (page 237,) commonly called the articles of war. Article 78 has no application to this case, which rests upon the proper construction of article 77. The reading of the latter article shows that the existence of other forces than those of the Regular Army is contemplated. When a volunteer force is spoken of as well as a regular army force, in the statutes of the United States, such force would seem to come within the description of some other force than that of the Regular Army.

But the claim is made on the part of the government that by virtue of the act of Congress of April 22, 1898, (30 Stat. 361,) and particularly that of March 2, 1899, (30 Stat. 977,) the officers of the Volunteer Army of the United States are not properly described by the words "other forces," within the meaning of the seventy-seventh article of war.

It is said that while the course of legislation prior to the passage of the acts above mentioned showed a clear distinction between the militia or volunteer forces and the Regular Army of the United States, the acts referred to, and especially that of 1899, changed the status of the volunteer forces enlisted under them, and, so far as the seventy-seventh article of war is concerned, rendered such force, in reality, the same in substance as the forces of the Regular Army, and not "other forces" of the country. We think this claim is unfounded, and that the distinction still exists within the meaning of the article.

The seventy-seventh article of war as enacted in 1874 was but a substantial continuation of provisions, found in various acts of Congress from the foundation of the government. In September of the year 1776 the Continental Congress enacted what is termed the Military Code of that year. In that code is to be found section 17, article 1, which reads as follows:

"SEC. 17, ART. 1. The officers and soldiers of any troops, whether minute men, militia, or others, being mustered and in continental pay, shall, at all times, and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.

"That such militia and minute men as are now in service, and have, by particular contract with the respective States, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war." (Winthrop's Military Law and Precedents, vol. 2, p. 1501.)

From the text of this section it is argued on the part of the government that the purpose of its passage was not to guard against the feeling of jealousy and distrust with which the professional soldier was regarded, as was stated by the court below, because, as the government claims, the regular forces of the Revolutionary War period were not made up of professional soldiers, and also because the article provided not only that the trials of militiamen should be before courts-martial composed entirely of militia officers, but that such officers should be of the same provincial corps with the offender. All this language, it is claimed, was but an expression in military legislation of the political doctrine, generally urged at that time in extreme form, that each State should be to the greatest extent practicable self-governing.

We think, however, there was, in addition to the idea of State control over the troops from a State, a recognition of the fact that there was a substantial difference between the regular forces and the militia. There was a recognition of the undoubted fact that at all times there has been a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve, to say the least, the men composing the militia as a branch not quite up to the standard of the Regular Army, either in knowledge of martial matters or in effectiveness of discipline, and it can be readily seen that there might naturally be apt to exist a feeling among the militia that they would not be as likely to receive what they would think to be as fair treatment from regulars, as from members of their own force. The reasons for the feeling are set forth fully in the opinion below, and we think quite correctly. It is most probable that Congress recognized all these reasons in its earliest legislation upon the subject as considerations upon which that legislation was founded.

This military code with the above-mentioned section remained in force during the War of the Revolution and until 1806. Various acts were passed in the meantime providing for calling the militia into active service, and the acceptance of volunteers was also authorized by the act of March 3, 1791, section 8, (1 Stat. 222, 223,) and by that of May 28, 1798, (1 Stat. 558,) but as stated by counsel for the government, none of the organizations of volunteers authorized by the legislation was actually received into the service of the general government and organized as United States troops.

By the act of April 10, 1806, (2 Stat. 359,) Congress established rules and articles for the government of the Army of the United States. Among them is the following:

"ART. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war,

and shall be subject to be tried by the court-martial in like manner with the officers and soldiers in the regular forces, save only that such court-martial shall be composed entirely of militia officers."

This section, it will be observed, leaves out the words "of the same provincial corps with the offender," which are contained in section 17 of the Military Code of 1776, above set forth, thus leaving the militia to be tried by courts-martial the members of which shall be composed entirely of militia officers. While the provision that the courts-martial should be composed of militia officers of the same provincial corps with the offender was left out, the other provision that the courts should be composed entirely of militia officers was retained. This legislation still recognized the difference between the militia and the regular forces, and provided for the trial of militia offenders by militia officers, while at the same time the restriction that such officer should be of the same provincial corps with the offender was stricken out, thus showing that of the two ideas, the one which recognized the general ground of distinction between the regular and the militia forces was stronger than that which restricted the trial of a member of the militia to courts-martial composed of the same provincial corps.

While it may be that there was then no particular distrust or jealousy of the Regular Army, the provision in question recognized, as we have said, the difference there was between the two bodies, the regulars and the militia or volunteers, and Congress still thought it proper to provide that those composing the latter force should not be tried by officers of the former. It was not jealousy or distrust of the Regular Army which led to the enactment; it was the radical difference existing between the two forces which made it proper to provide that regular officers should not sit in courts-martial to try offenders in the volunteer forces.

History shows that no militia, when first called into active service, has ever been equal to a like number of regular troops. It is not that the men composing the militia force are less brave or less intelligent, but they lack actual experience which the regulars have, and it is that fact which gives the regulars the feeling of superiority, and it is that feeling which is recognized by Congress and which has resulted in legislation of this character.

Further distinctions between the two forces are very well stated in the opinion of the Circuit Court of Appeals in this case.

This section 97 of the act of 1806 continued in force until the revision of the law in 1874. During this time the war of 1812, the Seminole war, the Mexican war and the Civil war were all carried on. During the Civil war the volunteer troops, called for under the first proclamation of the President, came primarily as State troops, and the general orders of the War Department provided for the appointment of all field and company officers by the governors of the States who were to commission them. The

same provisions in substance were contained in the subsequent acts of 1861. See acts of July 22, 1861, 12 Stat. 268; and August 6, 1861, chapter 75, sec. 3, 12 Stat. 317.

The statute of July 22, 1861, which provided that when vacancies occured in any of the volunteer organizations received into the service under that act, they should be filled by election, and that the officers so elected should be commissioned by the respective governors of the States, or by the President of the United States, was amended by the act of August 6, 1861, which provided for the appointment and commissioning of officers of volunteers exclusively by the governors of the States furnishing the same.

The question of the meaning of the ninety-seventh article of war, with reference to the volunteer forces of the civil war, was presented to Judge Advocate General Holt, who, on November 19, 1863, in an opinion, expressed himself as follows: "The words 'militia officers,' as employed in the ninety-seventh article of war, have been interpreted since the commencement of the rebellion as synonymous, as far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished," the object of the rule being that members of the volunteer forces of the Army at that time should be tried only by courts-martial composed of volunteer officers.

The intent of the legislation of 1874 was simply to preserve the rule which had existed from the formation of the government, and to keep up the distinction between the Regular Army and the volunteer forces, so far as to maintain the practice of trying volunteers by volunteer officers. The question was not so much how the volunteer or "other forces" came into the service of the government, whether under officers appointed and commissioned by governors of their States, or by direct enlistment as volunteers, to aid the government, but whether they were in fact volunteers and not members of the Regular Army. If they were volunteers, the same reasons for not being tried by regular army officers were present, whether they first volunteered through the State, and were then mustered into the service of the government, or entered directly into that service, for in both cases they were volunteers and were not members of the Regular Army.

The acts of Congress of 1898, (30 Stat. 361,) and of 1899, (30 Id. 977,) show conclusively, as we think, that the distinction was kept up and in the mind of Congress between the Regular Army and the Volunteer Army of the United States, and the declaration of section 2 of the act of 1898, which provides that in time of war the Army shall consist of two branches, which shall be designated respectively as the Regular Army and the Volunteer Army of the United States, is a plain recognition by Congress of the difference between the two forces. We cannot read the

various provisions of these two acts of Congress without being brought to the conclusion that they contemplated and particularly provided for the existence of other forces than that of the Regular Army. The Volunteer Army was one of such other forces, and also the militia when in active service of the United States, and the Marine Corps when detached and placed upon duty with the Army by order of the President. The volunteer force is certainly not the regular force or army, and if not, it must be some other force, and if so, its members cannot be tried by officers of the regular force or army. The act of 1899 does not assume to repeal that of 1898, excepting some specific provisions thereof, such as are mentioned in section eleven of the act of 1899. The balance of the earlier act remains in force, except as to any provision which may be in conflict with the act of 1899. Upon this particular matter of a distinction between the Regular Army and the Volunteer Army, there is no inconsistency between the two acts, and therefore the act of 1898 on that subject remains in connection with that of 1899.

It would unduly lengthen this opinion to cite the various sections of the two acts which provide for and prove this difference. It was done with much detail by the judge who wrote the opinion in the Circuit Court of Appeals when this case was before that court, and we refer to that opinion for those details which in our judgment are controlling proof that the volunteer officers and men constitute other forces than the Regular Army within the meaning of the seventy-seventh article of war.

Section 14 of the act of 1898 seems to us particularly significant of the desire of Congress to recognize and keep up the distinction between these various forces of the Army of the United States. It proves its purpose to keep the interests of the volunteer troops particularly in mind, and that they should be looked after by members of their own body. It is therein provided that a general commanding a separate department or a detached army shall have authority to appoint military boards of not less than three nor more than five of the volunteer officers of the Volunteer Army to examine into the capacity, conduct and efficiency of any commissioned officer of that army within his command. They were to be not only officers of the Volunteer Army, but were themselves to be volunteer officers. This section of the act of 1898 has never been repealed and is not in conflict with any part of the act of 1899. Although the volunteer troops organized under the last act of Congress were mustered directly into the service of the United States without regard to State or territory lines, yet the very provisions of both these acts with regard to volunteers show that they were organized as volunteers for a temporary purpose only and did not form any part of the force of the Regular Army. The same reasons which have existed since the formation of the government for prohibiting trials of such men by courts-martial composed of regular army officers

exist under these acts. The seventy-seventh article of war by its terms covers such a case. It has not been repealed or amended. The reasons for its enactment still remain as strong as when it was first adopted, and we think it covers the case of this officer who belongs to the Volunteer Army, raised under the act of 1899 and who was tried by a court-martial composed of regular army officers in violation of the act of Congress in that behalf. Congress could, of course, legislate for and temporarily enlarge the Regular Army, and the troops so enlisted for such Regular Army would be regular troops, notwithstanding they might be enlisted only for the term of the duration of a war then imminent or actually existing. Such was the act of February 11, 1847, (9 Stat. 123,) in regard to the war with Mexico. But that has no material bearing upon the proposition that troops not so enlisted but on the contrary enlisted simply and in terms as volunteers, would not be troops of the Regular Army, but would be what they purport to be, volunteers, a separate branch from the regulars, and constituting by the terms of the statute other forces than such regulars.

The mere fact of a direct enlistment of the volunteers into the service of the United States under the act of 1899 cannot, as we have said, change the essential character of the Volunteer Army as a different and separate force from that of the Regular Army.

By the act of February 24, 1864, (13 Stat. 6, sec. 24,) it was provided, (section 24):

"That all able-bodied male colored persons, between the ages of twenty and forty-five years, resident in the United States, shall be enrolled according to the provisions of this act, and of the act to which this is an amendment, and form part of the national forces.

* * * * * *

"But men of color, drafted or enlisted, or who may volunteer into the military service, while they shall be credited on the quotas of the several States, or subdivisions of States, wherein they are respectively drafted, enlisted or shall volunteer, shall not be assigned as State troops, but shall be mustered into regiments or companies as United States colored troops."

Here was a case where the colored troops were mustered directly into regiments or companies as United States (colored) troops, although credited on the quotas of the several States. They became United States troops, yet were not part of the Regular Army of the United States.

The Judge Advocate of the Army on December 16, 1864, rendered an opinion as to the composition of courts-martial for the trial of officers and soldiers in the Veteran Reserve Corps and United States colored troops, in which he used this language:

"In the absence of any statute law which either designates officers of the Veteran Reserve Corps or of the United States colored troops as regulars in express terms, or by a necessary implication from its provi-

sions, fixes upon them this status, the Secretary of War has not proceeded to so characterize them, and until he shall do so these officers should, so far as the composition of courts-martial is concerned, be regarded as a part of the volunteer force."

Without some statute, otherwise providing therefor, the Judge Advocate General was of opinion that those forces should be regarded as a part of the volunteer forces unless the Secretary of War otherwise characterized them. Whether that official had power to do so need not now be inquired into, but unless he did so the Judge Advocate General thought that the United States colored troops were to be regarded as a part of the volunteer forces.

We conclude that the acts of 1898 and 1899 still left the Volunteer Army as a separate or other force from the Regular Army of the United States.

The second proposition argued by counsel for the government we cannot agree to. If the defendant were a member of one of the "other forces," named in the seventy-seventh article of war, a court-martial, solely convened for the purpose of trying him, composed entirely of regular officers, would not have jurisdiction: Such a body would have jurisdiction over neither the subject-matter nor the person. A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. It was said by Mr. Chief Justice Waite in *Runkle* v. *United States*, (122 U. S. 543, 555):

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. (3 Greenl. Ev. sec. 470; *Brooks* v. *Adams*, 11 Pick. 441, 442; *Mills* v. *Martin*, *supra*; *Duffield* v. *Smith*, 3 S. & R. 590, 599.) Such, also, is the effect of the decision of this court, in *Wise* v. *Withers*, (3 Cranch, 331,) which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, (3 Pet. 193, 209,) ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. (*Dynes* v. *Hoover*, 20 How. 65, 80; *Mills* v. *Martin*, 19 Johns. 33.) There are no presumptions in its favor, so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown* v. *Keene*, (8 Pet. 112, 115,) in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' All this is equally true of the pro-

ceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The fact necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

What jurisdiction can a court-martial have which is composed of officers incompetent to sit on such court, of officers who are placed there in direct and plain violation of the act of Congress? This particular court was convened for the sole purpose of trying an officer of the Volunteer Army, and it was composed under the orders of the officer convening it of members each and all of whom were prohibited by law from sitting on such court. As to the officer to be tried there was no court, for it seems to us that it cannot be contended that men, not one of whom is authorized by law to sit, but on the contrary all of whom are forbidden to sit, can constitute a legal court-martial because detailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. Where does such a court obtain jurisdiction to perform a single official function? How does it get jurisdiction over any subject-matter or over the person of any individual? The particular tribunal is a mere creature of the statute, as we have said, and must be created under its provisions. It is a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved. The officers composing the alleged court were not *de facto* officers thereof, for there was no court, and therefore it could not have *de facto* officers. (*Norton* v. *Shelby County*, 118 U. S. 425, 441.) The attempt at the creation of a court failed because such attempt was a plain violation of the statute. A court-martial is wholly unlike the case of a permanent court created by constitution or by statute and presided over by one who had some color of authority although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected. But in this case the very power which appointed the members of and convened the court violated the statute in composing that court. It is one act, appointing the members of and convening the court, and in performing that act the officer plainly violated the law. Is such a court a valid court and the members thus detailed *de facto* officers of such valid court? Clearly not.

It is urged, however, that the seventy-seventh article of war contains no reference to the jurisdiction of courts-martial; that it merely provides that certain officers shall not be competent to sit on such courts to try certain offenders, and that the jurisdiction of the court to hear and decide is regulated by other articles. But the court-martial that has jurisdiction over any offense must, in the first place, be legally created and convened.

Such a court is not a continuous one, created by the statute itself and filled from time to time by appointments of certain members under the power given by statute. The court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members, and when in appointing such members he violates the statute, as in this case, by appointing men to compose the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial and has no jurisdiction over either the subject-matter of the charges against a volunteer officer or over the person of such officer. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate from the officers detailed to compose it. By the violation of the law the body lacked any statutory authority for its existence, and it lacked, therefore, all jurisdiction over the defendant or the subject-matter of the charges against him. It is said, in *Keyes* v. *United States*, (109 U. S. 336,) that where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

Within the *Runkle case (supra)* this particular court was not legally constituted to perform the function for which alone it was convened. It was therefore in law no court. The men were disqualified to act as members thereof, and no challenge was necessary, for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal. But this is not the case of a personal challenge of some member of the court where an objection to his sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute.

But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. His consent

had no effect whatever in the face of the statute which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial.

Kohl v. *Lehlback*, (160 U. S. 293,) was a criminal case, and it was held that in New Jersey the alienage of a juror participating in a trial was a subject of challenge when he was called; that it was for the State court to decide whether the verdict of conviction should be set aside on his motion when the accused did not interpose such challenge when the juror was drawn. The principle of that case does not apply here. It was an objection to a single juror, and was ground for a personal challenge. The presence of an alien on the jury did not render the court an illegal one, had no effect upon its jurisdiction over the person of the defendant or the subject-matter of the indictment, and therefore did not render the trial a nullity. The case at bar differs in all these facts, and the court, having been illegally constituted, had no jurisdiction to try the offender for any offense whatever, even with his consent.

It may also be said that the disqualification of a particular juror is brought before the court by a challenge in regard to the decision of which the juror takes no part. In this case no provision having been made for a challenge to the whole court, the challenge must have been to each member thereof, separately, and the officers to try the challenge would have to decide a question existing in the case of each of such officers precisely to the same extent that was presented in the case of the officer challenged, so that in effect each would be passing upon a challenge in his own case. We do not say that this fact alone creates the difference between the two cases. The material and all pervading fact constituting that difference is that the whole court is in the one case constituted in utter violation of the command of the statute, while in the case cited the court was legal, had jurisdiction over the subject-matter and over the person, and the sitting of one disqualified juror being a cause of personal challenge is waived by the failure to interpose it.

There are some cases cited by counsel for the government where disqualified judges sat in violation of the statute, such as *Pettigrew* v. *Washington County*, (43 Ark. 33;) *Fowler* v. *Brooks*, (64 N. H. 423;) *Crozier* v. *Goodwin*, (1 Lea, [Tenn.] 123;) *Holmes* v. *Eason*, (8 Id. [Tenn.] 754;) *Wilson* v. *Smith*, (38 S. W. Rep. [Ky.] 870.)

On the other hand, there is the case of *Oakley* v. *Aspinwall*, (3 N. Y. 547,) where it was held that a judge who was disqualified to sit in a cause by reason of consanguinity to one of the parties could not sit even by consent of both parties, and if he did the judgment in regard to which he took part would be vacated. In that case it was said (page 552:)

"It was, however, urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet, that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion. But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibition of a law—which was not designed merely for the protection of the party to a suit, but for the general interests of justice. (*Low* v. *Rice*, 8 John. 409; *Clayton* v. *Per Dun*, 13 Id. 218; *Edwards* v. *Russell*, 21 Wend. 63; 21 Pick. 101.) It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important in that respect that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his peculiar suit should be justly determined; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

A judge, who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction. This is the doctrine of above case. It has been followed without doubt or hesitation in the State of New York ever since its rendition in 1850. *People* v. *Connor*, (142 N. Y. 130,) is among the latest of the cases on that subject. See, also, *Sigourney* v. *Sibley*, (21 Pick. 101, 106;) *Gay* v. *Minot*, (3 Cush. 352;) *Hall* v. *Thayer*, (105 Mass. 219, 224;) *Railway Co.* v. *Summers*, (113 Ind. 10, 17.)

It is difficult for us to understand how an ephemeral court, composed of men detailed as members, each one of whom is so detailed in direct violation of the statute on that subject which prohibits their sitting, can obtain any jurisdiction over the subject-matter or person even by the consent of the defendant. In those cases where the judgment rendered by a disqualified judge was held free from attack because of a waiver, it can at least be said there was a valid court for other purposes than the trial or hearing of the particular case, and that the objection was simply a personal one, and should be made before the trial or it must be deemed waived. We are not inclined to that view, but the principle is not applicable to this case where the court is created and all the members of it are convened in total disregard and violation of the statutes upon the subject of its membership.

(3) We are also of opinion that the invalidity of the court-martial can be raised upon a hearing on *habeas corpus*. The judgment, even after the approval of the officers, provided for by statute, is that of a court of limited jurisdiction only, whose judgments may be attacked collaterally. In explaining the decision of *Wise* v. *Withers*, (3 Cranch, 331,) where he had himself written the opinion, Chief Justice Marshall said in *Ex parte*

Watkins, (3 Pet. 193, 209,) that it had been considered in the former case that a court-martial was one of those inferior courts of limited jurisdiction, whose jurisdiction might be questioned collaterally. In order to give effect to the judgment of a court of that nature it must appear affirmatively that the court was legally constituted; that it had jurisdiction, and that all of the statutory requirements governing its proceedings had been complied with. (*Runkle case*, *supra*.) Jurisdiction of inferior courts not of record must be affirmatively shown and no presumption thereof exists. (Freeman on Judgments, 3d ed. sec. 517.) They can, therefore, be attacked collateraly.

While the writ of *habeas corpus* cannot be converted into a writ of error, yet unless the court which tried the prisoner has jurisdiction to try and punish him for the offense the prisoner may be discharged on such writ. (*In re Coy*, 127 U. S. 731, 757.)

The question we are now discussing resolves itself into one of jurisdiction simply. If the court-martial had jurisdiction over the subject-matter of the charge against the defendant and of the person, or if the consent of the defendant gave such jurisdiction, the writ of *habeas corpus* will afford no relief, for generally, in such case any error committed by a court-martial regularly organized and with full jurisdiction is not assailable before the civil courts. (*Swaim* v. *United States*, 165 U. S. 553; *Carter* v. *McClaughry*, 183 U. S. 365.)

For the reasons already given, we think the court was illegally constituted, in violation of law, and that it had no jurisdiction over the person of the defendant or the subject-matter of the charges against him, and that consent could confer none in opposition to the statutory requirements for members of a court-martial convened to try him.

The question of who shall act on courts-martial for the trial of offenders belonging to the various branches of the Army of the United States is one entirely for Congress to determine. If it should think the time has come to do away with the distinction between the volunteer or militia force and the Regular Army, it rests in its discretion to so provide.

We are of opinion, after a careful examination of this record, that the decision of the court below was right, and the order discharging the defendant from custody should be

Affirmed.

The CHIEF JUSTICE and Mr. Justice MCKENNA dissented.

Mr. Justice GRAY and Mr. Justice BREWER did not hear the argument and took no part in the decision.